



REPUBLIC OF KENYA



KENYA LAW
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Akwanyi (Deceased) v Akwanyi & 2 others; Akwanyi (Respondent) (Succession Cause 241 of 1990) [2025] KEHC 18922 (KLR) (19 December 2025) (Ruling)

Neutral citation: [2025] KEHC 18922 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 241 OF 1990**

AC BETT, J

DECEMBER 19, 2025

IN THE MATTER OF THE ESTATE OF JASON AKWANYI (DECEASED)

BETWEEN

GAUDENSIA ALUOCH AKWANYI (DECEASED) PETITIONER

AND

RISPER ALOO AKWANYI 1ST OBJECTOR

MARGARET WAEME KUBENDE 2ND OBJECTOR

AND

ISAH NAKHAYO KABUCHEYI (SUBSTITUTED ADMINISTRATOR (FOR MARGARET WAEME KUBENDE) SUBSTITUTE

AND

CLEMENT OMONDI AKWANYI RESPONDENT

RULING

1. On 20th April 2024, a partition exercise was conducted on Land Parcel No. N. Wanga/Koyonzo/655, forming the subject of distribution in the estate of the late Jason Akwanyi. The survey was undertaken by a private surveyor allegedly appointed by the Respondent, Clement Omondi Akwanyi. The exercise gave rise to complaints from the Substituted Administrator/Applicant, Isha Nakhayo Kabucheyi, acting on behalf of the 2nd Objector (Margaret Waeme Kubende, deceased).
2. In the application dated 25th April 2024, the Applicant seeks orders for the resurvey and repartitioning of the said land parcel to be undertaken by the County Surveyor. She claims that the previous exercise was maliciously done without due consideration of the developed portion (1.96 acres) occupied by one



- Faraji Weyimi, a purchaser from their late mother, Margaret Kubende. The said purchaser has made significant developments, including permanent homes and farming, on the land.
3. The Applicant depones that she and her siblings consented to their 1.96-acre share being transferred to Faraji Weyimi and that the remaining portion of the estate is sufficiently large (approximately 12.4 acres) to accommodate all other beneficiaries without disrupting developed portions. She claims that the Respondent's actions and those of his surveyor (SMO Geospatial Systems Ltd) were malicious and intended to displace the developments, thereby necessitating fresh court-ordered partitioning.
 4. In opposition, the Respondent, Clement Omondi Akwanyi, filed a Replying Affidavit sworn on 22nd May 2024. He avers that he approached the Applicant's advocate to inquire about engaging a surveyor for the partition process. Upon the advocate's approval, he engaged a private surveyor and received written correspondence from the Applicant's counsel outlining the surveyor's fees and suggesting mutual agreement on the process.
 5. The Respondent denies knowledge of the sale of land by the late Margaret Kubende to Faraji Weyimi and asserts that the said land belonged to the late Gaudensia Aluoch Akwanyi, his mother. He alleges that Margaret's sale amounted to unlawful intermeddling with the estate, as she held no title. According to him, the purchaser is a stranger to the estate and cannot claim rights under succession.
 6. He further maintains that any allocation to the purchaser must be confined to the 1.96 acres allotted to the Applicant's household and states that this was indeed captured in the surveyor's report. He denies any malice in the manner in which the land was partitioned. He insists that the demarcation was conducted in accordance with a consent reached between the advocates of Bracksilla Anyango and the Applicant, a consent subsequently adopted by the court.
 7. The Respondent accuses the Applicant of defying the court's consent order and being in contempt. He avers that the beneficiaries had already contributed to the cost of the survey and that, should the court grant the resurveying application, the Applicant should bear the entire cost, including the issuance of new title deeds.
 8. On the issue of developments, the Respondent argues that it is the purchasers, not the Applicant, who undertook construction on the land before the grant was confirmed. He also discloses the presence of another purchaser, John Ochibu, and notes the existence of a burial site (of Margaret Kubende) between the plots claimed by the two purchasers. He challenges the practicality of reallocating that portion on the basis of cultural objections and logistical difficulties in issuing separate titles.
 9. The Respondent submits a sketch plan of the current demarcation and urges the court to uphold the consent-based partition adopted earlier. He concludes that the Applicant's application is not brought in good faith and should be dismissed.
 10. The matter was canvassed through written submissions. The Applicant submits that, although the estate was duly distributed in the confirmed grant of probate, the partition, as executed by the Respondent's surveyor, was unjust, with the intention of frustrating the Applicant by exposing the permanent developments of her representative to possible demolition. She prays that the court may invoke its inherent powers under Rule 73 of The Probate and Administration Rules to prevent the abuse of the court process and to protect equitable implementation of the confirmed grant. The Applicant referred to Nakuru HC Succession Cause No. 42 of 2015 – In The Matter of The Estate of Kaga Kamaru Gathua & Florence Njoki Kaga- vs- Joshua Kariuki Kaga to emphasize that it would be inequitable to take beneficiaries away from what are, practically speaking, long-established settlements in a rigid pursuit of equality. She argues the same rationale ought to apply to her matter, where a portion of land is already developed and occupied by her dependant, in accordance with the confirmed grant.



11. Further, the Applicant cites Nairobi HC Succession Cause No. 1307 of 2002 – In the Matter of the Estate of Samuel Kimotho Kariuki, where the distribution proceeded after the court deferred it for a report from the County Surveyor and Land Valuer on the actual occupation and use of the land. The Applicant argues that such a line of reasoning should apply in respect of the court ordering a fresh survey that respects actual occupation and development. The Applicant asserts that she is not reopening distribution but rather intervening to ensure that the implementation does not cause unnecessary disruption to already established families.
12. The Protestors oppose the application lodged on 25th April 2024 on the grounds that this Honourable Court is functus officio, having discharged its role upon confirmation of the grant and complete transmission of the estate. They submit that all beneficiaries, including the Applicant, received their shares in accordance with the rectified certificate of confirmation of grant dated 8th February 2024, and that titles have been registered accordingly. They argue that the Applicant actively participated in the subdivision and registration and now wants to reopen the processes on no legal footing. They rely on the decision in *Re Estate of the late Ismael Muchiri Nkinyangi (Deceased) [2021] eKLR*, where it was held that, “a court is functus officio when it has performed all its duties in a particular case... The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality.” They go on to argue that any challenge to the legality or fairness of the subdivision must now be brought before the Environment and Land Court, as this court’s jurisdiction over matters of succession ended upon transmission.
13. Further, the Protestors contend that the Applicant is promoting intermeddling within the meaning of section 45(2)(a) of the *Law of Succession Act*, by seeking to protect the interests of one Faraj Shiundu Weyimi, a stranger to the succession proceedings, who purportedly purchased a portion of land from the Applicant’s late mother, Margaret Kubende. The Protestors argue that this individual has no right to claim in the estate and that the Applicant’s actions undermine the sanctity of succession proceedings. They urge the court to dismiss the application with costs as an abuse of process, intended only to prolong a matter that has already spanned more than three decades. They assert that the principle of finality must now prevail, noting that “litigation must come to an end” to ensure that successful litigants enjoy the fruits of their success and to deter unnecessary legal agitation. Accordingly, the Protestors pray that the file be closed and that the beneficiaries be allowed to occupy their allocated land peacefully.

Analysis and Determination

14. The court records reflect that the grant, which was issued to Clement Omondi Akwanyi, was confirmed on 25th June 2021, and the estate of the deceased, the Late Jason Akwanyi, which consisted of L.R. No. N. Wanga/Koyozo/655 was distributed among the three households as follows;
 - a. Margaret Kubende representing the 1st house ... 3.5 Acres
 - b. Agnes Achieng representing the 2nd house ...3.5 Acres
 - c. Clement Omondi Akwanyi representing the 3rd house 5.4 Acres
15. On 8th February,2024, the court rectified the certificate of confirmation of the grant and issued it to Isha Nakhayo Kabuchenyi with the mode of distribution as follows;
 - a. Bracksila Anyango Shitandi(to hold in trust for himself and his siblings)... 1.54 acres.
 - b. Isha Nakhayo Kabuchenyi(to hold in trust for herself and her siblings) ...1.96 acres.
 - c. Agnes Achieng Murenga ... 3.5 acres.



- d. Clement Omondi Akwayi ... 5.4 Acres
16. I note that the application's concern is not with the mode of distribution but seeks to incorporate a purchaser, namely Faraji Weyimi, into the proceedings indirectly.
17. I have looked at the background of the application and note that his matter was dealt with by Justice P.J. Otieno, who directed that the distribution of the estate ensured that each beneficiary got their rightful share as per the rectified, confirmed grant. The court in its ruling stated as follows:-
- “To this court, a sale of an estate assets prior to confirmation and distribution without consent or authority of the court is contra statute and cannot be blessed by the court ratifying the same. To that extent, the court cannot acknowledge the sale as sought by Isha Nakhayo Kabuyenchi and Rosemary Wesonga Ahibeda.”
- Clearly, the Applicant had the opportunity to seek the court's intervention regarding the purchaser at the time, but her plea was not allowed by the court. In the circumstances, I find and hold that the court is functus officio.
18. Be that as it may, I have perused the sketch map while noting that the purchaser bought the 2.5 acres of land from Margaret Kubende (deceased), who is a sister of Meliza Ogweni(deceased). Meliza Ogweni is the mother of Bracksilla Anyango Shitandi.
19. In my view, the beneficiary who would be affected most by an order of re-survey is Bracksilla and his co-dependants yet they were not served with the application. I have gleaned from the pleadings that by an affidavit of protest dated 22nd June 2021, Bracksilla had proposed that, out of the 3.5 acres, because of the 1st house, he and his siblings receive 1.5 acres, while the Applicant and her siblings receive 2 acres. This is what was later compromised and a rectified Grant issued.
20. It is therefore apparent that Margaret Kubende could only dispose of 2 acres (later rectified to 1.96 acres) as her sister was a beneficiary of the balance of the land. Any purported disposal of land in excess of the 1.96 acres was unlawful as it violated the trust. However, the said issues do not fall within the province of the Probate and Administration court as the circumstances of this case are distinct from those in the above cited case of *In The Matter of The Estate of Kaga Kamaru Gathua & Florence Njoki Kaga- vs- Joshua Kariuki Kaga-(supra)* where the court declared that it was unfair and inequitable to uproot any of the deceased's children from the portions they had settled since time immemorial.
21. In *Jane Gachoki Gathecha vs Priscilla Nyawira Gitungu & Another [2008] eKLR*, the Court of Appeal took the view that a purchaser was not protected when the procedure used to acquire the grant was fraudulent. It found that a thief acquired no right or interest in stolen property; hence, any such transaction would be void ab initio, and the property was traceable, so that a purchaser could not invoke Section 93 of the *Law of Succession Act* to protect his title. Although a Certificate of Confirmation of Grant had been issued by the time of the disposal of the land, the judgement of the court was clear that Margaret Kubende was to hold 3.5 acres on behalf of the 1st house of the deceased and not in her personal capacity.
22. Needless to say, the court is not there to endorse illegalities, which is what the Applicant seeks. The Applicant needs to meet with her maternal cousins, represented by Bracksilla, to determine how the purchaser's interest in the land can be resolved. In the event they are unable to agree, the only recourse is the Environment and Land Court.
23. This is a reasonably old matter dating from the year 1990, and thus it should come to an end so that even the beneficiaries herein can realise their inheritance.



24. The principle that litigation must come to an end holds in this matter. My view is that no single court can resolve a contested dispute like the one herein in a manner that satisfies all parties. That is why the law provides that litigation must end in one way or another.
25. In the end, I find that the application lacks merit and dismiss it with no order as to costs, as this is a family matter.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 19TH DAY OF DECEMBER 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Okara for the Applicant

Ms. Lugulu for Protestors/Respondents

Court Assistant: Polycap

