

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
SUCCESSION CAUSE NO 84 OF 2021
IN THE MATTER OF THE ESTATE OF CHARLES MWITSUKHANI
(DECEASED)

PETER AZANGU MUGODO.....1ST
PETITIONER

EDWARD AMAI.....2ND
PETITIONER

BARNABA MWITSUKHANI.....3RD
PETITIONER

VERSUS

ERNEST MWALE
MWITSUKHANI.....OBJECTOR

RULING

INTRODUCTION

1. In his Summons for Revocation or Annulment of Grant dated and filed on 18th May 2012, the Objector sought an order that the Grant of Probate (Letters of Administration) issued on 8th March 1996 to the Petitioners herein in **P & A No 1995** at Vihiga Magistrates Court be revoked or annulled.
2. He averred that the Petitioners were not beneficiaries of the deceased's estate or *bona fide* purchasers of the Land Parcel No Serem/342 (hereinafter referred to as the "subject land") from the deceased and hence, they had no *locus standi*. He further stated that the said Cause was fraudulent because the names of 2nd and 3rd Petitioners were fictitious and they had also left out other beneficiaries of the estate. He added that the value of the estate

was over Kshs 1,000,000/= which was outside the pecuniary jurisdiction of the Magistrate's Court.

3. The 1st Petitioner swore a Replying Affidavit on 7th December 2012 in opposition to the Objector's Summons. The same was filed on even date. He averred that the Objector was a stranger in the list of children of the deceased as evidenced in the letter by the Chief dated 8th August 1995. He stated that succession was done through consultation and that all beneficiaries were notified with the 2nd Petitioner who now asserted his name was different, was present.
4. He contended that he was a purchaser of a portion of the subject land measuring 0.30 Ha which he purchased from one Kepher Muhindi at the value of Kshs 16,000/= on 19th December 1985. He added that Kepher Muhindi had bought the portion from the deceased's elder son, Christopher Wanye at the cost of Kshs 8500/= on 5th June 1979.
5. He asserted that the said Christopher Wanye, brother to the Objector, bought a piece of land elsewhere using the money from the said land sale where he lived, died and was buried leaving his family settled. He averred that the 2nd Petitioner who was renamed Ernest Mwale and the 3rd Petitioner were brothers. He was emphatic that he was a *bona fide* purchaser of the said portion of the subject land.
6. He argued that the Cause herein was not fraudulent because the names given by the 2nd and 3rd Petitioners were not fictitious as alleged but that it was the Objector's name which sounded fictitious.

He asserted that there were no other beneficiaries left out unless the Objector proved that they were more than three (3) boys in the family. He added that the family card from the Catholic Church Chemong Sub parish, Erusui Parish showed how the parents recorded their children's names from the 1st born Buchete to the last born Edward Amai and that the Ernest Mwale which the Objector purported to be his name was not on the said list.

7. He further averred that the late Christopher Wanye wrote a letter on 31st December 1994 allowing him possess his portion. He stated that all the three (3) beneficiaries were to sign forms in the magistrate's court but the Objector refused to go to court making the 3rd Petitioner also not to sign. He added that the Executive Officer signed on their behalf.
8. He asserted that on 10th July 1996, all the beneficiaries attended the Land Control Board meeting at Hamisi that was chaired by the former Vihiga District Commission (DC) Mr Dave Mwangi. He added that Christopher Wanye confirmed that he sold his portion and was living elsewhere whereupon the consent was approved in their presence.
9. He was categorical that he facilitated the Succession herein, survey and paid for the same and that the survey was done in the presence of the Objector. He further stated that the Objector had a bigger share of the subject land being 0.45 Ha in his name as mutation forms revealed. He pointed out that at the Objector's request and that of his brother, the 3rd Petitioner, at the Chief's office, he

accepted and managed to register the portion and obtained Title Deeds which the Objector could not collect because of the name he had on his identification card.

10. He asserted that the subject land did not exist at the Lands Registry because it had since been divided into three (3) portions being Tiriki/Seremi1231/1214/1215. He added that there were documents showing that the Objector was Edward Amai from birth. He pointed out that, for instance, at Saosi Primary School as a committee member in 2011, a complaint letter to the District Officer (DO) on 1st April 1995 addressed and signed the family card from Catholic Church Erusui which showed that the Objector was the last born and had sold a portion of the land to Michael Lihanda in 1997 using the name Edward Amai in the Agreement dated 22nd June 1997.

11. He further stated that he had stayed on the land for twenty-seven (27) years without interruption from the deceased and the Objector's late brother and was entitled to his portion by adverse possession of Title Deed Tiriki/Serem/1231 in which he had built a house and was carrying out farming. He urged the court to list the Objector as a Petitioner as he had put his names as Edward Amai and dismiss his claim.

12. The 3rd Petitioner also swore a Replying Affidavit on 7th December 2012 in opposition to the Objector's Summons for Revocation of Grant. The same was filed on 11th July 2023. He averred that they were born three (3) girls and three (3) boys as the

deceased's family. The boys were Christopher Wanye, Edward Amai and himself. He added that the deceased subdivided the subject land to his sons, including the Objector.

13. He contended that in 1979, their elder brother, Christopher Wanye, sold his portion to Kepher Muhindi and relocated to Kaptisi where he purchased land and lived with his family. He said that the said Christopher Wanye was buried in the said land. He was emphatic that the said elder brother sold his portion when the deceased was alive. He added that the said Kepher Muhindi subsequently sold the portion to the 1st Petitioner, which sale was known to the deceased who did not object as his son Christopher Wanye had settled elsewhere.

14. He was categorical that in the succession proceedings, he was consulted together with the Objector who appeared as Edward Amai and that no son of the deceased was left out. He added that they all met at the Chief's office when the 1st Petitioner was given the letter bearing what they had discussed which letter was sent to the DO.

15. He pointed out that the Chief's letter bearing their names and identification card numbers was done in their presence and that it was the Chief who gave the name Edward Amai as the Objector. He asserted that the 1st Petitioner assisted them do the succession as they had no funds. He added that Christopher Wanye, the Objector as Edward Amai and himself together with the 1st Petitioner attended Land Control Board in Hamisi.

16. He further asserted that as they had no funds, they requested the 1st Petitioner to obtain the Title deeds which he did and brought them, his being Tiriki/Serem 1215 and Amai's being 1214. He added that the survey was done in his absence but in the presence of the Objector.
17. He was emphatic that there had been no existence of the name Ernest Mwale in their family until he learnt that Edward Amai was Ernest Mwale in the identification card. He urged the court to compel the said Edward Amwai to join them using his usual name.
18. The matter proceeded by way of *viva voce* evidence. The Objector's undated Written Submissions were filed on 22nd May 2025 while those of the 1st and 3rd Petitioners were dated 16th April 2025 and filed on 17th April 2025. This Ruling is based on the said Written Submissions that both parties relied on in their entirety.

LEGAL ANALYSIS

19. The Objector faulted the 1st and 3rd Petitioners for lying to the court that he was Edward Amai while he was Ernest Mwale Mwitsukhani. He denied the allegations that they consented as a family to let the 1st Petitioner file for the Succession proceedings herein. He added that the 1st Petitioner did not prove the said consent. He denied threatening the 1st Petitioner with a jembe when the survey was being done and pointed out that no action was taken against him. He denied having removed the survey's beacons.
20. He further faulted the 1st Petitioner for lying to the court that he bought his land from Kepher Muhindi who had bought the same

from Christopher Wanye. He denied being baptised in Erusui. He blamed the 1st Petitioner for lodging this Succession Cause in exclusion of the deceased's family.

21. He also faulted the 3rd Petitioner for lying to the court that the deceased had six (6) children when he had seven (7) children being four (4) girls and three (3) boys. He urged the court to dismiss the Succession Cause that was lodged by the 1st Petitioner and allow the deceased's family to apply for the same.

22. On their part, the 1st and 3rd Petitioners questioned why the Objector had filed this case in Eldoret instead of Vihiga. They argued that the name Ernest Mwitsukhane was a deceased son to one of their sister's son who died in 2020 and that the 2nd Petitioner was the one purporting to be the Objector herein. They asserted that a cause of action should be taken against the said Edward Amai.

23. They argued that the Objector failed to demonstrate the harm he would suffer should the grant and certificate of confirmation be confirmed. They asserted that they produced the Chief's letter dated 8th August 1995, Chief's letter confirmation dated 16th January 2013 which showed who was Edward Mwitsukhane and a letter written by the said Edward Mwitsukhane on 4th January 1995 accusing the Area Chief.

24. They invoked Section 76 of the Law of Succession Act and argued that the Objector had not raised any ground for revocation of the grant and that the deceased's estate had been administered to its conclusion.

25. They were categorical that the power to revoke a grant was a discretionary power that had to be exercised judiciously and only on sound grounds and that there had to be evidence of wrong doing for the court to invoke Section 76 of the Law of Succession Act as was held in the case of **Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No 158 of 2000** (eKLR citation not given).

26. Section 76 of the Law of Succession Act Cap 160 (Laws of Kenya) provides that:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

a. that the proceedings to obtain the grant were defective in substance;

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

- i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**
- ii. to proceed diligently with the administration of the estate or**
- iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

e. that the grant has become useless and inoperative through subsequent circumstances.”

27. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at **Re: Estate of L A K - (Deceased) [2014] eKLR.**

28. Notably, the Objector testified that the deceased was his biological father and that he was not called to be part of the

proceedings herein. He asserted that he did not sign any documents herein. He stated that the deceased did not distribute his subject land and that the 1st Petitioner had moved the boundary that he shared with the deceased.

29. It was his further testimony that the 1st Petitioner was the deceased's neighbour and was not from his clan. On cross examination by the 3rd Petitioner, he stated that he followed the brother to the 3rd Petitioner in the order of birth that his name was Ernest and not Edward Amai as alleged. He admitted that he was aware that his Sister Edna Indoshi had a son called Ernest Mwale which was a similar name to his. He stated that he sued Edward Amai and the 1st and 3rd Petitioners because those were the names on the search he had conducted.

30. On cross-examination by the 1st Petitioner, he testified that the 1st Petitioner demarcated the subject land and took a bigger portion and only left after hiving off the said bigger portion of the subject land. He denied that his name was on the register from Chemongo Sub Parish. He admitted taking the 1st Petitioner to the Chief together with the 3rd Petitioner and that Edward Amwai was not part of them. He denied having known one Kepher Muhindi or the existence of any sale of portion of the deceased's subject land. He was emphatic that it was not true that they took the 1st Petitioner to the Chief for him to obtain Title Deeds for them. He further denied that they agreed as a family that the 1st Petitioner should be their administrator of the estate of their father.

31. On the other hand, the 1st Petitioner testified that when they went to the Chief, the Objector and the 3rd Petitioner told the Chief that they wanted him to do Succession for them but that there was no consent in writing of the same. He stated that when the Chief questioned in what capacity he would be filing the succession proceedings as he was not a family member, the Objector and the 3rd Petitioner did not say anything. He further stated that he did not give his portion from the subject land but that it was Kephher Muhindi who sold the said portion to him.
32. The 3rd Petitioner testified that the succession proceedings were done in 1985 and then later said it was in 1973. When the court intervened and asked if the succession was done before the deceased died in 1993, he did not seem to have a clear answer. He later denied that the Objector was a son to his deceased father and mother one Jeritina Khadenje Mwitsukhane.
33. A perusal of the proceedings herein indicated that Letters of Administration Intestate of all the estate of the deceased herein were granted to the 1st and 3rd Petitioner. The court had noted that the 1st Petitioner had occasionally mentioned that he was a Petitioner/Buyer. The Chief's Letter dated 8th August 1995 indicated that the deceased was survived by only three (heirs) being, the 1st and 3rd Petitioner and one Edward Amai Mwitsukhane whom the Petitioners alleged herein that he was the Objector.
34. The Objector vehemently denied being the said Edward Amai Mwitsukhane. Additionally, although it was clear from the record of

evidence that the deceased was survived by six (6) children, only two (2) children were purportedly mentioned in the proceedings in exclusion of the deceased's daughters. No affidavits were filed to show that the said daughters were aware of the succession proceedings of their deceased's father's estate but were not interested in the distribution.

35. A perusal of the Sale Agreement dated 19th December 1985 showed that the 1st Petitioner bought a portion of the deceased subject land from one Kepher Muhindi who was alleged to have been the Vendor. However, no evidence was adduced to show that the said Kepher Muhindi bought the land from the deceased's son, the late Christopher Wenya. Be that as it may, this appeared to be a dispute relating to ownership of the land of a child of the deceased which was transferred. It did not, therefore, form part of the deceased's estate.

36. Indeed, in the case of the case of **Benson Mutuma Muriungi vs CEO Kenya Police Sacco & Another [2016]eKLR** where it was held that "estate" meant the free property of a deceased person and that free property in relation to a deceased person meant the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest had not been terminated by his death.

37. Going further, questions were raised as to who actually the said Edward Amai Mwitsukhane was. Whereas the Petitioners insisted that he was the Objector, the Objector denied the same.

This court was unable to unravel this mystery. This made it difficult for it court to really interfere with the issuance of the Grant of Letters of Administration as it did not know who between Edward Amai Mwitsukhane or Ernest Mwale would have been the rightful challenger of the said Grant of Letters of Administration. Even so, as the property the 1st Petitioner purchased was from the son of the deceased, consent by the Objector was not required as it has been stated hereinabove that the said property did not form part of the deceased's estate.

38. In the circumstances foregoing, it was this court's considered view that the Objector herein had not satisfied the grounds under Section 76 of the Law of Succession Act warranting the revocation of Grant herein issued to the 1st and 3rd Petitioners.

39. The issue of jurisdiction was neither here nor there as the file had already been transferred from Eldoret to this court which had the jurisdiction to handle the same.

DISPOSITION

40. For the foregoing reasons, the upshot of this court's decision was that the Objector's Summons for Revocation or Annulment of Grant dated and filed on 18th May 2012 was not merited and the same be and is hereby dismissed.

41. As this was a family matter, the court deviated from the general principle that costs follow event so as to preserve the family ties.

42. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **27th** day of **January** 2026

J. KAMAU
JUDGE

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