



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION CAUSE NO. 344 OF 2010**

**IN THE MATTER OF THE ESTATE OF MAKOKHA ELIMA  
MAFWABI (DECEASED)**

**BETWEEN**

**FICHINIA BARASA MAKOKHA Alias  
VIRGINIA MAKOKHA BARASA ..... 1<sup>ST</sup>  
ADMINISTRATOR/APPLICANT**

**JULIUS WAWIRE MAKOKHA ..... 2<sup>ND</sup>  
ADMINISTRATOR/APPLICANT**

**VERSUS**

**JULIUS KWEYU MUKWE .....  
RESPONDENT**

**RULING**

**Background**

1. The deceased to whose estate these proceedings relate died on 5/10/2003, leaving surviving him three widows, five children and a grandson named as dependants in a petition for letters of Administration dated 26/5/2005.

2. The petition was filed by Mwanaisha Makokha Opondo, the third widow of the deceased. On 29/3/2017, a Certificate of Confirmation of Grant was issued to the Petitioner wherein the estate of the deceased was distributed as follows:-

(a) (i) Virginia Makokha Barasa

(ii) Edwin Wanzala Makokha

(iii) Mwanaisha Makokha Opondo

To get 5.67 acres each from L.R. No. E/WANGA/MALAHA/47.

(b) (i) Virginia Makokha Barasa

(ii) Mwanaisha Makokha Opondo

To hold in common in equal shares the commercial rental houses on L.R. No. BUNYALA/BUDONGA/956.

(c) Sugarcane proceeds from Mumias Sugar Company to be shared equally between Virginia Makokha Barasa, Edwin Wanzala and Mwanaisha Makokha Opondo.

3. After confirmation of Grant, it transpired that L.R. No. E/WANGA/MALAHA/47 was no longer in the name of the deceased as it had been transferred to Julius Wawire

- Makokha on 21/6/1999. The said Julius Wawire Makokha filed an application seeking leave to join the proceedings as a son and beneficiary of the estate of the deceased, and as the then registered owner of L.R. No. E.WANGA/MALAHA/47, which he maintained was transferred to him by the deceased.
4. The Administrator was aggrieved with the said Julius Wawire Makokha's claim and preferred criminal charges against him vide Mumias SPMC.Cr. Case No. 1139 of 2019 in which the said Julius Wawire Makokha was charged with obtaining registration of the land title in respect to L.R. No. E/WANGA/MALAHA/47 by false pretences in that he presented that the deceased had transferred the land to him, a fact which he knew to be false.
  5. In a Judgement delivered on 27/8/2021, the court found Joseph Wawire Makokha, then the accused, guilty and convicted him of the offence. Thereafter, he was placed on probation for three (3) years after a reconciliation driven by the Probation Office.

6. Subsequent to the conviction, the trial court issued an order dated 7/8/2021 in which it cancelled the fraudulent registration made in favour of the Accused and reverted the land to the deceased.
7. From the affidavits filed by the parties, the confirmed Grant was later implemented and L.R. No. E/WANGA/MALAHA/47 closed on partition whereby the resultant titles being L.R. No. E/WANGA/MALAHA/2816, 2817, and 2818 were transmitted to Mwanaisha Makokha Opondo, Virginia Makokha Barasa, and Edwin Wamalwa Murumba, respectively.
8. Pursuant to an application made by Virginia Makokha Barasa and Julius Wawire Makokha on 26/10/2020, Hon. S. Chirchir, J. made a ruling dismissing Wawire's application to be joined as an interested party. However, she allowed the objection proceedings, set aside the Certificate of Confirmation of Grant and directed that the Petitioner reapply for confirmation of Grant, as the court declined to revoke the Grant on the grounds that the other

dependants of the deceased had not been informed of the Confirmation hearing and were therefore absent.

9. In the course of the proceedings, the Administrator died on 27/1/2024, and to progress the proceedings, this court appointed Fichinia Barasa Makokha and Julius Wawire Barasa as joint administrators on 23/7/2025 with the expectation that they would proceed with the summons for confirmation of the Grant. At the time the court appointed Julius Wawire Makokha as a joint administrator, it was not aware of his previous conviction for the fraudulent transfer of the deceased's property.

### **The Application**

10. By an application dated 22/9/2025, the administrators sought injunctive orders and a warrant of arrest against Julius Kweyu Mukwe, whom they accused of intermeddling with the estate of the deceased comprising all that parcel of land known as L.R. No. E/WANGA/MALAHA/47.
11. The gravamen of the application is that on 18/9/2025, the Respondent and other unknown armed goons or thugs invaded a portion of the land comprised in L.R. No.

E/WANGA/MALAHA/47 and applied excessive force to uproot and destroy the maize and napier crop of the 1<sup>st</sup> Administratrix and, in the process, confined the 1<sup>st</sup> Administratrix by locking her in her house. They further threatened her with dire consequences should she dare shout for help or get out of her house.

12. The application was supported by an affidavit sworn by the 1<sup>st</sup> Administratrix on 19/12/2025 and in which she deponed that after the Respondent's unlawful acts, the 2<sup>nd</sup> Administratrix lodged a report vide OB No. 11/18/09/2025 at Shianda Police Station, but as at the time she filed their application, the police had not taken any steps to investigate the issue.
13. The 1<sup>st</sup> Administratrix averred that by reason of the Respondent's unlawful and violent actions, she and her family have been living in fear. It is her prayer that the Respondent be restrained by himself or through his proxies, from forcibly trespassing, taking possession and using the deceased's estate forming land parcel No. L.R.

No. E/WANGA/MALAHA/47 pending the determination of this Cause.

14. The application was opposed by the Respondent, who filed a replying affidavit and averred that pursuant to the confirmation of Grant on 13/12/2016, the property comprised in L.R. No. E/WANGA/MALAHA/47 had been closed on partition and transmitted to the named beneficiaries. The Respondent deponed that his wife, Rose Achieng Barasa, purchased 0.8 hectares comprised in the deceased Administrator's title number L.R. No. E/WANGA/MALAHA/2816 for valuable consideration, following which the said title was closed on subdivision, and the resultant title excised therefrom being L.R. No. E/WANGA/MALAHA/2822 transferred to him. The Respondent averred that the transfer was effected after the requisite consent to subdivide and transfer was obtained from the relevant Land Control Board and that after the transfer, his family fenced off the property and took occupation thereof without any challenge from the family of the deceased.

15. The Respondent further averred that he knew that the other beneficiary, Edwin Wamalwa Murumba, had sold his portion comprised in L.R. No. E/WANGA/MALAHA/2818 and handed over possession to the purchasers, and only the 1st Applicant's portion remains in her name.
16. He also averred that he had filed an affidavit of protest to the Applicant's fresh Summons for Confirmation of Grant as the inclusion of L.R. No. E/WANGA/MALAHA/47 in the schedule of properties available for distribution was prejudicial to his rights as a purchaser.
17. The application was canvassed through written submissions, which the court has considered.

### **Analysis and Determination**

18. Flowing from the parties' affidavits and submissions, the following issues arise for determination:-
  - (a) *Whether the setting aside of the Certificate of Grant on 18/5/2023 resulted in the cancellation of the new titles resultant from subdivision of L.R. No. E/WANGA/MALAHA/47 and reversion of the title to the deceased.*

*(b) Whether the Respondent has intermeddled in the estate of the deceased.*

*(c) Whether the application has merit.*

19. Regarding the first issue, the court has to determine the effect of the ruling dated 18/5/2023, where the court set aside the certificate of confirmation of the Grant. On reviewing the said ruling, it is noted that the court made the following orders:-

**“(a) The 2<sup>nd</sup> Applicant’s Prayer to be joined as an interested party is hereby dismissed.**

**(b) The confirmation orders of 13.12.2016 are hereby set aside and the certificate of confirmation of Grant is hereby cancelled.**

**(c) The petitioner to reapply for confirmation of Grant.**

**(d) The prayer for revocation of Grant for letters of Administration is hereby dismissed.**

**(e) Each party to meet their own costs.”**

20. In **Re Estate of Juma Omwanda (Deceased) [2025] KEHC 9837 (KLR)**, Justice Musyoka W. rendered himself on the effect of cancellation of grant vis-à-vis revocation of Grant and stated:-

**“As indicated above, the certificate of confirmation of grant is an extract from the confirmation orders. Cancellation or revocation of the certificate would serve no purpose, for it would leave the confirmation orders, from which it is founded, intact. A person, aggrieved about the confirmation orders, should go after the said orders, not the certificate extracted from them. The way to go about it is not by way of summons for revocation, under section 76, but either review or setting orders aside of the confirmation orders.”**

21. It is patently clear from a reading of the order dated 18/3/2023 that the court did not revoke the Grant. In any event, the court noted that it could only review and set aside the orders of confirmation of Grant. There was no

express order cancelling any titles obtained after the transmission process. As it stands, therefore, the parcel of land referred to as L.R. No. E/WANGA/MALAHA/47 is no longer in existence as it was extinguished through partition on transmission.

22. Section 45 (1) of the Law of Succession Act provides:-

**“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”**

23. To succeed in their application, the Applicants needed to prove that at the time the Respondent moved into the property that is the subject matter of the application, the same was “free property” of the deceased.

24. The subject property herein was acquired by the Respondent after Certificate of Confirmation of Grant, albeit one that was later set aside. As to whether the

Respondent has intermeddled with the estate of the deceased, it is noted that the Respondent's occupation of the L.R. No. E/WANGA/MALAHA/2822, which resulted from the partition of L.R. No. E/WANGA/MALAHA/47 is anchored on an agreement of sale and transfer from the deceased Administrator. This was not refuted by the Applicants. The said property could no longer be held to form part of the estate of the deceased at the time of the transfer as the deceased Administrator had the power, authority and capacity to sell and transfer the same.

25. In **Re-Estate of Moses Kirimi Mbogori (Deceased) [2021] 7943 KEHC (KLR)**, the court was faced with a situation similar to the present one and stated that:-
- “In this matter, even though the applicant did not avail a search over the property, both counsel agree that the subject property is registered in the applicant's name. That concession establishes, prima facie, that the property as of today does not form part of the**

deceased's estate but belongs to the applicant. What does not evidently belong to the deceased ought not to be included as his asset. Such inclusion does nothing but to unduly delay the conclusion of the matter and thus distort the court's mandate and obligation to dispense justice in a prompt and expeditious manner."

26. Section 93 of the Law of Succession Act provides:-

**"(1)All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.**

**(2)A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities,**

**funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”**

27. The Applicants have not demonstrated that the transfer of the subject property to the Respondent was fraudulent. In the absence of proof of fraud, the Respondent is protected by virtue of Section 93 (1) of the Law of Succession Act. I hasten to add that Section 93 does not protect fraudulent dealings. See **Musa Nyaribari Gekone & 2 others v. Peter Miyianda & Another [2015] KECA 573 (KLR), Adrian Nyamu Kiugu v. Elizabeth Karimi Kiugu & Another [2014] KEHC 1840 (KLR)**. Since the title had already passed, the property no longer formed part of the estate of the deceased, and without notice of the setting aside of the Certificate of Confirmation of Grant and the cancellation of title, the Respondent cannot be held liable for intermeddling.
28. Having carefully considered the application, I find that the same is not merited. The Applicants should pursue

the application for confirmation of the Grant of Letters of Administration as directed by the court.

29. Accordingly, the application dated 19/9/2025 is dismissed. There shall be no order as to costs.

Dated, signed, and delivered at Kakamega, this 20<sup>th</sup> day of February 2026.

**A. C. BETT  
JUDGE**

**In the presence of:**

Mr. Osango for the Applicants

Mr. Kisaka for Respondent

Court Assistant: Polycap