



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate Rasto Masinde Nangubo (Deceased) (Succession Cause
227 of 2009) [2025] KEHC 761 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 227 OF 2009**

REA OUGO, J

JANUARY 29, 2025

**IN THE MATTER OF THE ESTATE OF THE LATE
RASTO MASINDE NANGUBO (DECEASED)**

BETWEEN

RICHARD MASINDE NANGUBO PETITIONER

AND

MAKOKHA OPICHO JOB OBJECTOR

RULING

1. In a Motion dated 20.11.2023 Daniel Wanjala Masinde seeks the following orders; the court do set aside the consent order dated 24.3.2011 removing parcel number Bokoli/ Bokoli /612 from the estate of the deceased in this succession cause and the court be pleased to declare that land parcel Bokoli/ Bokoli / 612 forms part of the estate of the succession cause. The application is supported by the grounds on the face of the application and the supporting affidavit Daniel Wanjala Masinde(the applicant) dated 20.11.2023 and a further affidavit dated 8.7.2024.
2. The applicant depones as follows; he is the grandchild of the deceased and the family has agreed that he take over the administration of the estate. The father of the former petitioner now deceased was the owner of the suit land which he later jointly registered with the objector, a son of his brother. On 10.3.2011 the then advocate representing the petitioner herein and the advocate representing the objector entered into a consent to remove land parcel number Bokoli/ Bokoli / 612 from the deceased's estate. He avers that the petitioner never instructed his advocates on record to enter into such a consent and that the same was done fraudulently without the consent and knowledge of the petitioner. Land parcel Bokoli/ Bokoli/612 was registered in the joint names of the Objector's father Makokha Opicho (deceased) and the petitioner's father Rasto Masinde (deceased) and the same has been the subject of litigation in other courts being Bungoma High Court Succession Cause No. 153 of 1997 and Bungoma HCCC (OS) No 69 of 2012. In Cause No.153 the petitioner sought to object to the issuance



of the grant to the objector and the court ruled that because the Suitland was registered jointly the same automatically moved to one surviving proprietor who is now the Objector herein. The applicant therefore moved to court seeking adverse possession of the said Suitland in OS 69 of 2012 and the court held that the respondent therein did not demonstrate the extent of occupation and nature of interference. An undisputed fact was that the objector herein accepted that of the 34 acres, 17 acres belonged to him and 17 belonged to the family of the deceased. The 2 cases have rested and there is no appeal. The Objector has sold the 17 acres and has now embarked on selling the 17 acres belonging to the deceased. It's inconceivable that the former petitioner would fight for the said share in two consecutive suits and then enter into a consent giving out the entire suit land in total to the exclusion of his kin and purchasers. It was held in Case no 69 of 2012 that it has never been determined which part of the 34 acres belongs to the estate of the deceased and which part belongs to the objector. There is boundary dispute, hence as per the applicant, it is imperative that the whole Suitland reverts so that the boundaries are drawn and the matter rests. The petitioner's father passed on in 1988 and thereafter the Objector's father transferred the land parcel number Bokoli/ Bokoli/ 612 to his name and further subdivided the same into other parcel numbers; Bokoli/ Bokoli/ 1833, 1834, and 1835. The petitioner herein and other family members have been living on the suit land as per the established boundaries ever since he was young to date since it's their ancestral land. They also have buyers staying in the said land. He is apprehensive that the objector has ill motive of evicting them from this property and they have no other place to call home. The respondent will not suffer any prejudice and is in the interest of justice.

3. The respondent Makokha Opicho Job filed a replying affidavit dated 11.12.2024. He deposes as follows; land parcel number Bokoli/ Bokoli/ 612 has never formed part of the estate of the deceased. He was registered as the proprietor of the said Suitland on 31.5.1999. On 10.5.2011 the petitioner's advocate counsel Kituyi without any coercion entered into a consent to remove land parcel number Bokoli/ Bokoli/ 612 as the estate of the deceased in the cause. The grant of letters of administration of the estate of the deceased did not include the said Suitland and the petitioner tried through Cause No. 153 of 1997 to include and the same was dismissed. The petitioner filed OS No. 69 of 2012 and again it was dismissed. He acquired the Suitland under section 118 of the Registered *Land Act* and later subdivided it between the two families of the deceased therefore land parcel number Bokoli/ Bokoli/ 612 does not exist as it has been subdivided to parcel numbers Bokoli/ Bokoli/ 1834, 1835 and 1836. From the history of the land his brother Nelson Simiyu is entitled to 17 acres and the petitioner's father Rasto Masinde Nangubo is entitled to 17 acres although he sold 2 acres. Parcel number 612 was closed on the sub-division.
4. The application was canvassed by way of oral submissions. I have carefully considered the affidavits and the submissions. The order sought by the applicant is that land parcel number Bokoli/ Bokoli/ 612 be declared to be part of the estate of the deceased. He claims that the consent dated 24.3. 2011 was fraudulently entered into by the then counsel of the petitioner. From the pleadings before me the parties in this matter have been before this court and also the ELC. The applicant alleged the then petitioner's counsel fraudulently entered the consent date. In the case of KCB Limited vs Specialised Engineering Co. Ltd [1982] KLR the court held;

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement.”
5. In law, any allegation of fraud must be proved. It is not just enough to state that there was fraud, it has to be established. In the case cited by the applicant, the court held that there was undue influence and



duress upon the appellant. No evidence has been adduced on the allegation of fraud. He who alleges a fact has to prove it (see Section 109 of the *Evidence Act* Cap 80).

6. On the 2nd order sought that this court declares that land parcel number Bokoli/ Bokoli/ 612 forms part of the estate of the succession cause. I find that the respondent has demonstrated that this parcel of land no longer exists. The court's decision in O.S No. 69 of 2012 was that the objector owned the land wholly after the death of the petitioner and that the court could not nullify the titles created as was sought by the applicant, the deceased petitioner. This was the court with the jurisdiction to nullify the said title. I have taken note of what the objector states on the subdivision of the Suitland. He admits that the petitioner's family is entitled to 17 acres out of the 34 acres of the Suitland which after subdivision became titles numbers Bokoli/ Bokoli / 1834, 1835, and 1836. I find no merit in the application dated 20.11.2023. It is dismissed. Each party to bear its costs.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 29TH DAY OF JANUARY 2025.

R.OUGO

JUDGE

In the presence of;

Mr. Alovi -For the Applicant

Respondent - Absent

Wilkister C/A

