



REPUBLIC OF KENYA



**In re Estate of Fundi Indasi (Deceased) (Succession Cause
10 of 2022) [2025] KEHC 5353 (KLR) (28 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 10 OF 2022**

JN KAMAU, J

APRIL 28, 2025

IN THE MATTER OF THE ESTATE OF FUNDI INDASI (DECEASED)

BETWEEN

FRANCIS INDASI FUNDI OBJECTOR

AND

JOASH MUSODA AMAI PETITIONER

RULING

1. In his Summons for Revocation and Annulment of Grant dated 7th August 2012, the Objector sought that the Grant of Letters of Administration issued to the Petitioner in Vihiga Succession No 31 of 2011 on 12th October 2011 and confirmed on 27th June 2012 be annulled and/or cancelled. He also sought that all subsequent entries made at the Vihiga Lands Register in respect of land parcel No Tiriki/Jepkoyai/810 (hereinafter referred to as the “subject land”) pursuant to a confirmation of the said Grant be cancelled and the said parcel of land be restored in the name of the deceased. He further sought that this court do issue a fresh Grant in his name as the rightful administrator of the estate of the deceased.
2. He swore an Affidavit in support of the said Summons for Revocation on 7th August 2012.
3. He averred that he was the son and only beneficiary of the deceased who died on 1st January 1998 at Givole Sub-location within Vihiga County and that the Petitioner was the son to the late Amayi Musoda who was the brother to the deceased.
4. He pointed out that the Petitioner ought to have succeeded his late father’s land known as Tiriki/Jepkoyai/815 instead of the deceased’s subject land herein. He asserted that the Petitioner’s son had encroached on the subject land by constructing a house thereon under the instructions of the Petitioner.



5. He stated that he was in occupation of the subject land where the deceased was interned. He averred that he learnt of the Succession proceedings at Vihiga Law Court when the Petitioner's son, one Jairo Lihondo Musoda, constructed a house on the subject land in the year 2010 without his consent and after doing a search, he found that the Petitioner had been registered as the Administrator to the deceased's estate herein.
6. He stated that the Petitioner had no right to succeed the deceased's father's estate when he was given land by their grandfather which he resides on with his family. He pointed out that the Petitioner conspired with the area provincial administration not to disclose the correct surviving beneficiaries to the deceased estate. He asserted that the Petitioner's son was illegally cultivating the said subject land and ought to be restrained.
7. In opposition to the said Summons for Revocation, the Petitioner relied on his Replying Affidavit sworn on 8th April 2013 and filed on even date.
8. He averred that he bought the subject land from the deceased in 1972 at Kshs 600/= which he fully paid.
9. He stated that together with the deceased, they proceeded to demarcate his portion which was 0.3 hectares. He asserted that the deceased was his uncle and that he did the succession in respect of his estate because they lived together from 1975 and were dependent on each other until 1993 hence he considered him as his father.
10. He contended that he had adopted the Objector as his son and took care of him as a young boy until he disappeared from his custody only to resurface at the deceased's funeral. He was emphatic that he was entitled to the deceased's estate both as a Purchaser and as a dependent. He added that he was the one who pointed out to the Objector the portion that constituted his land on the subject land and where he had built a home and that he was prepared to give him a portion of the subject land but his efforts were frustrated by his obstinacy.
11. On 11th December 2023, this court directed that the matter proceed by way of viva voce evidence and gave directions on the filing of their respective witness statements and documents to be relied on. The Objector's Witness Statements were both dated 2nd November 2023 and filed on 8th November 2023. The Petitioner's Witness Statements was undated but the same was filed on 8th November 2023.
12. The Objector did not file any Written Submissions. The Petitioner's Written Submissions were dated 10th October 2024 and filed on 31st October 2024. This Ruling is therefore based on the viva voce evidence and the said Petitioner's Written Submissions only.

Legal Analysis

13. The Petitioner reiterated that he purchased part of the subject land from the deceased in 1972 and that the existence of the said transaction was not in dispute and had not been challenged. He added that it was also not in dispute that he had instituted succession proceedings in the Senior Magistrate's Court at Vihiga Succession Cause No 311 of 2011 and that he was issued with a Certificate of Confirmation of Grant and a Title in respect of the subject land.
14. He contended that it was not in dispute that the Objector had all along been using and/or making good of his portion of the said subject land since 1972 up-to-date and which the Local Administration and the Objector confirmed when he was cross-examined.



15. He further asserted that it was not in dispute that the deceased was a brother to the Petitioner's father and that the Petitioner and the Objector were cousins and that under the Luhya-Tiriki Customs and usages they were both deemed as brothers and sons of their deceased fathers.
16. He urged this court to be guided by Article 159(a) of *the Constitution* of Kenya, 2010 and find that the Objector had failed to establish his case to the required standard and the same should be dismissed with costs. He further urged the court to uphold the Trial Court's position and direct the Land Registrar Vihiga be ordered to survey and issue respective Title Deeds to himself and the Objector as per the measurement and/or demarcated on the ground.
17. Notably, the Objector testified that the deceased used to lease the subject land to many people to use to get food. He said that he lived with his father for seven (7) years in Kitale and he died in 1986. He pointed out that he was arrested in 2013 for cultivating the subject land, the same year that the Petitioner's son constructed a house on the subject land.
18. He said that he filed a case at the High Court Case No 873 of 2012 where he was given orders restraining anyone including the Land Registrar from interfering with the subject land. He pointed out that they tried resolving the issue at the District's Officer the same year.
19. He told the court that his wife was always at home taking care of the deceased and that he learned of the institution of the succession proceedings by the Petitioner in 2012. He was emphatic that he never notified him of the same and that is why he had applied for revocation of the Grant herein. He said that he was not aware of any sale agreement between the deceased and anyone else and in particular with the deceased, in respect of the subject land which was initially registered in the deceased's name. He produced Chief's Letter dated 8th June 2010 and the Green card in support of his case.
20. The Petitioner told the court that he occupied the subject land in 1972. He wished that the subject land be subdivided to both of them. He relied on the documents that he had filed to support his case.
21. He confirmed that he did not live in Tiriki/Jepkoyai/815 but Tiriki/Jepkoyai/813 as the former was for his neighbour. He said that his home and that of the Objector were separated by a river. He admitted that the Objector took him to court at Kakamega in 2012 but denied that the court told him not to construct a house for his son on the subject land. He was emphatic that he had the Sale Agreement which was proof that he bought a portion of 0.3 ½ (sic) of the subject land from the deceased.
22. He further said that the deceased died in 1996 without having given him the Title Deed to the said portion. He stated that he did not lodge the succession cause alone but waited for the Objector as they had both agreed but he failed to appear in court. He asserted that the deceased died while his son was living on the subject land and that when they went to resolve the issue at the District Officer's Office and the District Commissioner's Office, the Objector was told not to disturb him with regard to the subject land.
23. He further testified that the Objector was young when he bought the portion of the subject land and his mother had since gone back to her ex-husband, thus, the deceased was by himself. He was categorical that the deceased told him to wait for the Objector to get an identification card before they could subdivide the subject land. He explained that the fact that he had four (4) children living on a small parcel of land was not the reason he was pursuing the subject land. He asserted that the witnesses to the said Sale Agreement had since died.



24. 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.”

25. 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.

26. Having said so, before the orders sought could be granted, an applicant and/or objector must prove that the grounds for revocation have been satisfied.

27. Notably, the Objector was the deceased’s son, a fact that the Respondent did not dispute. The Petitioner confirmed that the deceased was his uncle as he was a brother to his late father. A perusal of the Chief’s Letter dated 28th June 2010 was also clear that the Objector was the only son of the deceased.

28. The Petitioner claimed that he petitioned the court for succession of the deceased’s estate on the ground that the deceased had sold to him part of the subject land and had died without giving him the Title Deed.

29. In his evidence, he produced the Sale Agreement dated 15th January 1972 which was written in Maragoli language and had a translation in Kiswahili language by one Bonface Anubi who filed his Certificate of Translation dated 7th October 2023 on 8th November 2023.

30. The Objector did not rebut that evidence. However, he was emphatic that he was not aware of any Sale Agreement between the deceased and the Petitioner herein but that he was aware that the deceased would lease out his subject land to many people.

31. Although the Objector averred that he was left out of the succession process, a perusal of the Certificate of Confirmation of Grant dated 27th June 2012 showed that he was considered as one of the



beneficiaries in the distribution of the subject land. A Title Deed was also issued to that effect indicating both him and the Petitioner as the registered proprietors of the subject land. This was confirmed by a copy of the Search that was dated 12th March 2013.

32. The Petitioner admitted that he was a nephew to the deceased. In that regard, the Objector ranked in priority to him in applying for a Grant of Letters of Administration. Indeed, Section 38 of the Law of Succession Act Cap 160 (Laws of Kenya) provides as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

33. The ranking of inheritance of a deceased’s estate was set out in Section 39 of the Law of Succession which states that:-

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-

- a. father; or if dead
- b. mother; or if dead
- c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

34. The Petitioner was therefore way below the rank to have petitioned for a Grant of Letters of Administration Intestate. A perusal of the Petition shows that the Objector did not sign the consent. It bore a name “Francis” which the Objector denied was his signature. In fact, the Petitioner confirmed that the Objector refused to attend court hence his decision to obtain the Grant of Letters of Administration Intestate himself.

35. The Petitioner ought to have cited the Objector herein as the sole beneficiary of the deceased to take out the Grant of Letters of Administration Intestate. He ought to have obtained a court order to petition for the said Grant. However, he took a short cut. This was unlawful as it amounted to intermeddling with the deceased’s estate as envisioned in Section 45(1) of the Law of Succession that stipulates that:-

“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.”

36. Going further, this court took the view that having the deceased’s property registered in his name was unlawful as he did not provide any evidence that the deceased obtained a consent from the Land Control Board as provided in Section 6 (1) of the Land Control Board Cap 302 (Laws of Kenya) that states that:-

“Each of the following transactions, that is to say:-



- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
 - b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
 - c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act (emphasis court).
37. The deceased's land was agricultural land as contemplated in Section 6 of the *Land Control Act* and it was expected that any transaction relating to the subject land had to comply with the provisions of the said *Land Control Act* which was assented on 11th December 1967 and commenced on 12th December 1967. Indeed, the purported sale was said to have been in 1972 when the *Land Control Act* was already in existence. For all purposes and intent, the purported sale of the subject land to the Petitioner herein was void.
38. Going further, Section 8(1) of the Land Control Board states that:-
- “An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto (emphasis court):
- Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.
39. In addition, the purported Sale Agreement that the Petitioner adduced in court was not registered under Section 19(1) of the *Stamp Duty Act* Cap 480 (Laws of Kenya) that provides as follows:-
- “Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—
- a. in criminal proceedings; and
 - b. in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”
40. Having considered this case, it did appear to this court that everything was wrong about the way the Petitioner acquired the portion of the deceased's subject land. It was immaterial that he had obtained the Title on his own behalf and that of the Objector herein. The procedure was wrong and could not be allowed to subsist.
41. This court was therefore satisfied that the proceedings to obtain the grant were defective in substance as contemplated in Section 76(a) of the Law of Succession and there was, therefore, merit to revoke the Grant of Letters of Administration that was issued to the Petitioner herein. In addition, the registration



of the Title Deed in the Petitioner's name was irregular as the sale was void by virtue of not having complied with Section 6(1) of the Land Control Board Act lending it to be cancelled and to revert to the deceased's name. In addition, the purported Sale Agreement was not stamped under Section 19(1) of the *Stamp Duty Act* and was therefore inadmissible in evidence.

Disposition

42. For the foregoing reasons, the upshot of this court's decision was that the Objector's Summons for Revocation or Annulment of Grant dated 7th August 2012 and filed on 8th August 2012 was merited and the same be and is hereby allowed in the following terms:-
 - a. That the Grant of Letters of Administration Intestate and the Certificate of Confirmation of Grant that were dated 12th October 2011 and 27th June 2012 respectively issued in the name of the Petitioner herein be and are hereby revoked and/or cancelled forthwith and with an order that the same be re-issued in the name of the Objector herein forthwith.
 - b. That all entries in L.R. No Tiriki/Jepkoyai/810 be and are hereby cancelled.
 - c. That the Land Registrar Vihiga be and is hereby directed to rectify the Register to revert the ownership of the said L.R. No Tiriki/Jepkoyai/810 in the name of the deceased who was its original owner.
 - d. That the Objector is hereby directed to file and serve Summons for Confirmation of Grant by 30th May 2025.
 - e. That it is further directed that this matter to be mentioned on 23rd June 2025 to confirm compliance and/or for further orders and/or directions.
43. As this was a family matter, this court deviated from the general rule that costs follow events so as to preserve the family ties and directs that each party bears each costs of this Summons.
44. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF APRIL 2025

J. KAMAU

JUDGE

