



**In re Estate of Cypriano Ngeresa Muhizi alias Ngereso Muhizi (Deceased)  
(Succession Cause 638 of 2010) [2025] KEHC 7476 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 638 OF 2010**

**PJO OTIENO, J**

**MAY 29, 2025**

**IN THE MATTER OF THE ESTATE OF CYPRIANO  
NGERESA MUHIZI ALIAS NGERESO MUHIZI (DECEASED)**

**BETWEEN**

**PHELISTERS KIDAMBI NGERESA ..... ADMINISTRATOR**

**AND**

**JOAN AMISI AMBIRA ..... APPLICANT**

**RULING**

1. Before the court for determination is the applicant's Notice of Motion dated 29/3/2023 brought pursuant to sections 47 and 93(1) of the *Law of Succession Act*, articles 165(3) and 162(2) of the *Constitution* of Kenya, 2010. The motion seeks orders that; the orders of 4/7/2022 and 13/3/2023 be reviewed and/or be varied/set aside in view of serious jurisdictional question of the court sitting as a probate court vis a vis the constitutional jurisdiction vested under article 165(3) and (5) in the Land & Environment Court, the court be pleased to further review/set aside or vary its orders of 13<sup>th</sup> March 2023 and 4<sup>th</sup> July, 2022 in view of its powers under section 76 of the *Law of Succession Act* and the resultant order that results in cancellation of titles resulting from a completed transmission process without a substantive suit in the land and Environment division of this court; in view of the above prayer, the court do declare that Section 76 of the *Law of Succession Act* only extends to situations where transmission has not been completed and the court sitting as a probate court should therefore down its tools and allow the relevant court of competent jurisdiction to take over the matter and finally, and in the alternative and without prejudice to the above, the court do further determine the following questions for review;
  - a. Since the revocation of the grant was based on the basis that the applicant and the children were excluded and a stranger one JOAN AMISI IMBIRA included as a purchaser, what would be



court's decision if there is new evidence that the purported property that was excluded indeed belonged to the deceased?

- b. What is the net effect of revoking a grant in respect of the deceased estate and narrowing its confirmation to one property instead of 3?
2. The court is further left to be at liberty to issue any or further orders it deems just and fit to grant and also to provide for the costs of the application.
3. The application is supported by the affidavit of Joan Amisi Imbira sworn on 29/3/2023 in which she avers that in the month of December, 2009 she was approached by Ambrose Ngeresa, son to the deceased and father to one Ronald Ngeresa and Wycliffe Madahana, for her to purchase a portion of a share in land parcel number Kakamega/Viyalo/1055 which the said Ambrose had inherited from his father and which she purchased for a sum of Kshs. 350,000/-. She claims that she has resided in the said property for the past 13 years with the full knowledge of the family members. She further claims that upon conclusion of the succession cause, land parcel number Kakamega/Viyalo/1055 was sub divided into 2067, which was then registered in her name and 2066 registered in the name of Patrick Ngeresa. She states that she recently learnt that the grant giving rise to her title was recently revoked and that the revocation only affected the parcel she bought. On the basis of her purchase, she contends that she acquired title for value and that her title was not subject to challenge in the succession file it was birthed, even by an application for revocation of grant. To her the order revoking the grant and canceling the resultant titles was thus unlawful and made without jurisdiction and should thus be reviewed.

#### **Response to the application**

4. The application was opposed by Phelisters Kidambi Ngeresa in her replying affidavit sworn on 26<sup>th</sup> June, 2023 in which she avers that she is a daughter of the deceased who lived polygamous life and was survived by two sets of children from the two families. The persons entitled to inherit were listed as follows:

1<sup>st</sup> House

With Maria Ngeresa-Widow (Deceased); the two had the following children;

- a. Robai Ngeresa (Deceased) left behind no child.
- b. Beneda Adisa Amwayi (Deceased)- survived by the following children; Rose Ayuma Amwai, Ambrose Muhitsi Amwai, Consolata Amukasa Amwai, Charles Khamati Amwai
- c. Atanasi Ngeresa (Deceased)-survived by the following children; Alexinah Kidambi Limanye, Mildred Musemi Limanye, Steward Madahana Limanye, Faustus Ngeresa Limanye, Nicholas Ngeresa Limanye, Scarlet Musemi Limanye, Desmond Tutu Limanye, Lynnetted Muyoma Limanye
- d. Andrew Ngeresa

2<sup>nd</sup> House

With Elizabeth Ngeresa- Widow (Deceased); the deceased had the following children.

- a. Patrick Ngeresa
- b. Ambrose Ngeresa (Deceased) but survived by the following children; Rose Kidambi Ngeresa, Mary Musimbi Muhitsi, Wycliffe Madahana Muhitsi, Ronald Ngeresa Muhitsi
- c. Phelisters Ngeresa



d. Vincent Ngeresa (Deceased)

4. The objector claims that the 1<sup>st</sup> house was settled in a different parcel while land parcel number Kakamega/Viyalo/1055 was left for the 2<sup>nd</sup> house. She claims that Patrick Ngeresa connived with the chief to disinherit them and that the applicant is neither a creditor nor a beneficiary of the deceased's estate. She further contends that the sale of a portion of the deceased estate by Ambrose Ngeresa was an illegality because he had no capacity to pass a proper title.

### Background

5. .Following the death of Cypriano Ngereso Muhizi alias Ngeresa Muhizi on the 27<sup>th</sup> December 1981, Patrick Ngeresa Muhitsi petitioned the court, in the capacity of a son, for a Grant of letters of administration intestate which Grant was issued on 26<sup>th</sup> July,2011 and confirmed on 22<sup>nd</sup> April, 2013. The Certificate of Confirmation of Grant distributed the estate comprising of only parcel of land known as Kakamega/Viyalo/055 as follows;
- Patrick Ngeresa Muhitsi 0.14HA
  - Joan Amisi Imbira 0.20HA
6. The distribution to Joan Amisi Imbisi was done in her capacity as a purchaser of a portion of the parcel of land sold to her by Patrick Ngeresa and Ambrose Ngeresa vide a sale agreement dated 14<sup>th</sup> June, 2009.
7. On the application of the administrator, the confirmed Grant was revoked on the basis that the objector, being a daughter of the deceased and one other child of the deceased were excluded from the succession proceedings and that the respondent who they claimed to be stranger of the estate was given a share of the estate. The objector was then appointed the administrator.
8. After the initial Grant was revoked, afresh Summons for Confirmation of Grant were filed and confirmed on 6<sup>th</sup> November, 2022 distributing parcel of land known as Kakamega/Viyalo/1055 equally between the administrator
- Ronald Ngeresa Muhitsi and Wycliffe Madahana Muhitsi-0.11HA
  - Phelisters Kidambi Ngeresa-0.11HA
  - Patrick Ngeresa Muhitsi-0.11HA
9. While it is not disputed that the persons to whom the estate was distributed are beneficiaries of the estate, it is that confirmation and the resultant distribution that gave rise to the instant subject application with the respondent contending that she is entitled to a share of the estate for being a bona fide purchaser for value.

### Issue For Determination

10. Although the application makes multiple prayer and poses questions for answers by the court, the court discerns the questions that then arises for determination by the court to be whether; a case for review of a court order has been made out. The answer to that question would itself depend on whether Patrick Ngeresa and Ambrose Ngeresa had the legal capacity to pass a good title in the sale of a portion of the deceased's estate to the respondent before being appointed as the personal representatives of the deceased. There is then the next question on jurisdiction and whether Section 67 of the [Law of succession Act](#) only extends jurisdiction up to the point of confirmation of the grant then ceases to apply.
11. The applicant has further, at prayer 6 of the Motion, poses two questions for answer from the court. The two questions presuppose circumstances not supported with any facts. The court views the two



questions as hypothetical for lack of evidence to help determine same. Being a family dispute court ought to be called upon to make clear determination with clear orders capable of execution and never to render itself in rather academic or hypothetical manner. The court is thus hesitant to seek answers to those two questions.

## Analysis

12. According to the death certificate, the deceased died on the 27<sup>th</sup> day of December 1981. Following that death, the law ordains, his property vested in his estate until a personal representative is appointed by a court of law in line with section 79 of the [Law of Succession Act](#). As of the date of the alleged sale of a portion of the deceased's estate in the property known as Kakamega/ Vityalo/1055 to the applicant by Patrick Ngeresa and Ambrose Ngeresa, in their capacity as sons of the deceased, neither had been appointed a personal representative. The immediate question one must pose and answer is whether both had the capacity to deal with the asset as purported.
13. To the court, it is mundane that the sale of land could not have been valid having taken place before succession proceedings were initiated in respect to the estate of the deceased. Only a personal representative could have the capacity to dispose an immovable asset of the estate after confirmation and transmission or else with the express leave of the court. The reading of section 79 of the [Law of Succession Act](#) is clear that the estate of a deceased person can only vest in the personal representative of the estate and that a personal representative can only exercise the powers vested in him or her under section 82 of the Act. Section 82(b)(ii) of the Act outlaws the sale of an immovable assets before the grant is confirmed unless it is done with the leave of the court.
14. That the sale took place before the grant was issued and confirmed makes the transaction void ab initio and the court cannot approve an illegality. It was an illegality because the [law of succession Act](#) codes a criminal offence called intermeddling.
15. In arriving at the above conclusion, the court resonates with the decision of the court in *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR where it was held as follows;

“... the above means is that any transaction that is entered into with regard to the assets before representation is obtained, be it selling or leasing or contracting in connection with the assets, would be unlawful, and the contracts entered into would be unenforceable for that reason. A grant-holder can bind the estate since the assets vest in them by virtue of section 79, and any contracts entered into with regard to estate assets would be enforceable. However, there is a restriction with respect to immovable assets. The proviso in section 82(b) (ii) of the [Law of Succession Act](#) is to the effect that immovable property is not to be sold before the grant has been confirmed. That would mean that where it becomes necessary to dispose of estate assets for whatever reason, the administrators have to have regard to that provision. It bars them from selling such property before confirmation. If the estate requires funds so urgently that it cannot wait for confirmation, then the prudent thing would be to move the court for leave to dispose of such property before confirmation for reasons that they should place before the court. Otherwise, any contracts that they would get into contrary to that proviso would leave them with contracts that they cannot enforce on account of their unlawfulness.”
16. The respondent places reliance on section 93 of the [Law of Succession Act](#) for the proposition that the validity of a transaction will not be effected by the revocation of a grant provided that the sale was made by a personal representative in line with section 82(b)(ii) which was not the case in this instance.



- That provision cannot come to their aid because they never sold as personal representatives. They acted unlawfully and thus intermeddlers.
17. That conclusion would be sufficient to dispose of the matter because there was a glaring case for revocation. In addition, nothing has been demonstrated to show an error or mistake glaring on the face of the record; new and important matter of evidence that could not have been availed at the time the order was made, due diligence notwithstanding; or any other sufficient reason. I would at this juncture dismiss the application for being devoid of merits.
  18. However, there was a contention that section 67, of the Act ceases to be operative once the estate is transmitted. In making that very bold assertion, the applicant cited no statute nor decided case to support his position. In fact, the court granted the parties the opportunity to file written submissions but none was filed. The court finds the assertions bare and disengaged from the law and thus baseless.
  19. That position notwithstanding, the words of section 67 are clear and unequivocal that an application for revocation of a grant, on the statutorily provided grounds, may be brought at any time whether before or after confirmation. Transmission is a product of confirmation and distribution conducted with the authority of the court in the order on distribution by the personal representatives as appointees of the court. The law gives to the personal representatives all the power the deceased would exercise over the estate save that their mandate is court given and controlled. As it were, being appointees of the court, the personal representative executes the powers donated by the court in the order. Because the law appreciates the fallibility of the court, there is always a window to revisit a court order where the law allows, so that the objects and ends of justice are met and not defeated. The remedy of revocation serves the same purpose, seeking to meet and achieve the objects and purposes of justice.
  20. So, if one was to be persuaded that once transmission take place, however unjustly, the succession court is rendered otiose, some questions would arise. The first is whether transmission blinds the court to every inequity extending to mistakes, inadvertence or even fraud. To this court that would be an antithesis of every norm and attributes of a justice system. The court thus finds no merit on the assertion that the act of transmission divested it of jurisdiction to issue the order revoking the grant and canceling titles issued pursuant to the revoked grant.
  21. The court further finds that by very clear provisions of section 34 of the *Civil Procedure Act*; an order can only be challenged in the file in which it was issued and not in a fresh file. That serves to avoid the possibilities of different courts issuing different orders to the embarrassment of the due process of the law. It is thus untenable that the administrator was to avoid the succession court and challenge her disinheritance before the Environment and Land Court. Such would not only affront the cited provision of the *Civil Procedure Act* but also the constitutional provisions vesting the jurisdiction of the Environment and Land Court.
  22. This determination does not render the applicant helpless and without a remedy. She has and knows the persons to whom she paid the money on an unenforceable agreement. When properly counseled, she has her remedies somewhere else but not in these inheritance proceedings.
  23. For the reasons and conclusions set out above, the court finds the application dated 29<sup>th</sup> March, 2023 to lack merit and the same is dismissed with costs. The costs are awarded in a family matter because the applicant is not a family member of the deceased.

**DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF MAY, 2025.**

**PATRICK J O OTIENO**

**JUDGE**



**DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 29<sup>TH</sup> DAY OF MAY, 2025.**

**S. MBUGI**

**JUDGE**

In the presence of:

Ms. Luseno for the Petitioner

C/A: Agong'a

