



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Ndombi Makale (Deceased) (Succession Cause
179 of 1997) [2024] KEHC 7568 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 7568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 179 OF 1997
REA OUGO, J
JANUARY 31, 2024
IN THE ESTATE OF NDOMBI MAKALE (DECEASED)**

IN THE MATTER OF

**DICKSON WAFULA WANONYI 1ST PETITIONER
VINCENT WANYAMA NDOMBI 2ND PETITIONER**

RULING

1. Ndombi Makale died on the 12th July 1986. Vincent Wanyama Ndombi the deceased's son (the 2nd petitioner) petitioned for a grant of letters administration intestate on 13/9/1994. As per his affidavit in support of the petition the 2nd petitioner listed 2 beneficiaries Patrick Wanyala and himself and Land Parcel no. Kamukunywa Scheme/L0/6322/5 as the only asset. A grant of letter of administration intestate was issued on the 19th of November 1997 to the petitioner. The grant was confirmed on the 18th June 2014. Vincent share was 11 acres and Patrick share was 8 acres as per the certificate of confirmation.
2. On the 12th March 2015 John Mukusi Ndombi applied to revoke the grant confirmed on the 19th day of June 2014. On the 19th May 2021 the grant issued to Vincent was revoked and 3 administrators were appointed Festo Mukusi Ndombi, Festo Wanyonyi Ndombi and Vincent Wanyama Ndombi. The court ordered that any transfer as a result of the confirmed grant was cancelled and the parcel of land was to revert in the name of the deceased Ndombi Makale. A grant was issued on the 26th of July 2021 in the names of the said 3 administrators.
3. On the 23rd of July 2021 Festo Wanyonyi Ndombi the 2nd petitioner applied to confirm the grant issued in the names of the 3 administrators. John Mukusi Ndombi filed an objection to the proposal made by Festo Ndombi Wanyonyi. Before the objection was heard Festo Ndombi Wanyonyi died. Dickson Wafula Wanyonyi sought to substitute the late Festo Ndombi Wanyonyi. On 21/2/2022 the application made by Dickson was granted . On the 20th of July 2022 a grant of letters of administration intestate was issued to Dickson Wafula Wanyonyi and Vincent Wanyama Ndombi.



4. The subject of this ruling is the application to confirm the grant. Dickson filed an affidavit in support of the said application. He avers as follows; the deceased was survived by the following ;
 - a. Yohana Mukusi Ndombi (aka) John Mukusi Ndombi- son (deceased)
 - b. Festo Wanyonyi Ndombi – son (Deceased)
 - c. Joseph Wafula Ndombi- son (Deceased)
 - d. Vincent Wanyama Ndombi-son
 - e. Patrick Wanjala Ndombi- Dependant
5. The deceased owned Land Parcel No. Bungoma/ Komakoiwa/322 measuring approximately 8. 2 acres. The said parcel of land was acquired on a settlement scheme fund trustee loan in 1964. The loan was cleared but the same has not been discharged. John Mukusi Ndombi is now deceased and during a meeting, it was decided that his share be held in trust by Joseph Manyandio Mukusi his son. The share due to Joseph Wafula Ndombi (deceased) is held in trust by Boaz Wekesa Wafula his son on behalf of their children. After the death of Festo Wanyonyi Ndombi in a meeting held on 11/10/2021 he was appointed to represent the family of the Festo Wanyonyi. The deceased did not sell land to anyone during his lifetime. That if Vincent sold land from the deceased’s estate then the share due to the said buyer, should be sorted out in another forum between Vincent and the said buyer. He proposes that the parcel of land be shared out as follows;
 - i. Dickson Wafula Wanyonyi to get- 1.64HA
 - ii. Joseph Manyandio Mukusi to get -1.64HA
 - iii. Boaz Wekesa Wafula to get - 1.64HA
 - iv. Vincent Wanyama Ndombi to get- 1.64HA
 - v. Patrick Wanjala Ndombi to get - 1.64HA
6. Vincent Wanyama Ndombi filed an affidavit of protest to the summons for confirmation of grant on 4/5/2023. He avers as follows that; before their late father’s demise, he was the registered owner of the following parcels of land Nos. Bungoma/ Kamakoiwa/322 (parcel no.322) , Bungoma/ Kibisi/271 (parcel no. 271), Bungoma/ Tongaren/298 (parcel no. 298) and Bungoma/Kabuyefwe/233(parcel no. 233). Just before his father’s demise, he was on the verge of bequeathing the aforementioned parcels of land to his beneficiaries. The deceased had allocated parcel No. Bungoma/ Kibisi 271 to John Ndombi, Bungoma/ Tongaren/298 to Festo Wanyonyi Ndombi, Bungoma/ Kabuyefwe/ 223 to Boaz Wekesa Wafula and Bungoma/ Kamakoiwa/ 322. The amended summons for confirmation has not been brought in good faith and the applicant has concealed material facts on the estate of the deceased. The named land parcels not under distribution were registered in the names of his brothers through a transfer initiated by their deceased father who acquired them from the settlement scheme through cards. That all his brother/ sons of the deceased all died while domiciled at their respective land parcels as stated and all their heirs including the applicant the son of Festo Wanyonyi Ndombi occupy and reside on the said parcels of land. His proposal that land parcel Bungoma/ Kabuyefwe/322 (parcel no. 322) be distributed as follows;
 - a. Dickson Wafula Wanyonyi (to hold in trust of Festo Wanyonyi Ndombi (deceased) – 2 acres
 - b. Joseph Manyandio Mukusu (to hold in trust of John Mukusi Ndombi (deceased) – 2 acres
 - c. Boaz Wekesa Wafula (to hold in trust of Joseph Wafula Ndombi (deceased) -2 acres



d. Patrick Wanjala Ndombi - 3.254 acres

e. Vincent Wanyama Ndombi -11 acres

Total 20.254 acres

7. Dickson Wafula Wanyonyi filed a further affidavit on the 14th of June 2023 in response to the affidavit of Vincent. He avers as follows; land parcels nos. 298, 233, 271 and 322 referred to in Vincent's affidavit are properties of the Settlement Scheme Fund Trustee as per the certificates of official searches. He denies that the deceased was on the verge or in pursuit of bequeathing his property before his death as alleged by Vincent. He also denies that they reside in the said land as alleged by Vincent. He opposes the mode of distribution suggested by Vincent and avers that the court should fairly distribute the said property. The deceased's family all reside in parcel number 322 to date and their respective portions had been allocated by the deceased and are still intact. Parcel number 322 is the only parcel available for distribution. Parcel number 271 is still registered in the names of the late Yohana Mukusi Ndombi. Yohana bought the said parcel of land during his life time. Parcel number 223 was purchased by the late Joseph Wafula Ndombi through a loan from the Settlement Scheme Trustee and he died before changing the registration after it was discharged. He has receipts issued to the late Joseph (DWW3a, b and c). Parcel Number 279 vis a vis 298 was solely bought by the late Festo Wanyonyi Ndombi but the same is still registered in the name of the Settlement Fund Trustee. The late Festo Wanyonyi purchased it from Kiptabut Arap Kirambe and they have court proceedings between them that show that he was the buyer and owner (see DWW4). The said beneficiaries even if they had their parcels of land should not be denied their fair right share of inheritance as sons of the deceased in parcel number 322 which is the net estate due for distribution. He is aware that without any consent the 2nd petitioner sold off the deceased's land to third parties, he sold 2 acres to Patrick Tuchi Wekesa and that's why he wants to get the lion's share so that he can transfer the 2 acres to him.
8. During the hearing Vincent and Dickson both testified. Dickson adopted his affidavits in support of the application. He was adamant that the only parcel for distribution was parcel number 322 that the other parcels mentioned do not belong to the deceased as they were bought by various beneficiaries and that Vincent should not get a bigger share. Vincent too adopted his affidavits his evidence. He too maintained that the brothers were given the other land parcels by his father stated in his affidavit by the father. That his brothers were buried in their respective lands and that his father said in his will that he was to inherit parcel number 322. He admitted that Patrick has been selling the shamba and that he had no document to show that his father gave his brothers the respective parcels of land he had mentioned in his affidavit.

Analysis and Determination

9. At the close of the hearing Counsels representing the parties elected not to submit on the evidence or the law. I have considered the evidence of the parties and the law of succession as provided under the [Law of Succession Act](#) Cap 160.
10. The issues for determination are; which parcel of land is for distribution and how should the land be distributed. There is no dispute that land parcel no. Bungoma/ Kamokoiwa/ 322 belongs to the deceased. The protestor claims that parcel numbers 271, 298, 223 were registered in the name of the deceased. He has annexed a certificate of official searches to support his claim. I have perused the said documents and this is what they indicate; Title No. Bungoma/ Tongaren/298 of 6.4Ha belongs to Settlement Fund Trustees, Title No. Bungoma/ Kabuyefwe/223 of 6.3HA belongs to Settlement Fund Trustees, Title No. Bungoma/ Kamakoiwa/322 belongs to Settlement Fund Trustees and Title no. Bungoma/ Kabisi/ 271 belongs to Yohana Makusi Ndombi. These searches are dated 10th June



2015. He has not annexed any current searches to show whether the proprietorship of the 3 parcels has changed. Dickson has annexed the following titles; Bungoma / Kabisi/ 271 which is registered in the names of Yohana Mukusi Ndombi the title is dated 19th July 2004, a certificate of official search for title number Bungoma/ Kabisi/ 271 which was also exhibited by the protestor. Further he annexed official receipts in the name of Joseph Wafula on account of 0130233 Kabuyefwe scheme issued by the District land adjudication & settlement officer dated 4/3/2011, 17/8/1998, 18/8/1998. He has also annexed proceedings of a land of a case between Kaptabut Arap Kirembe vs Wanyanyoi which was heard by a panel of elders who ruled that the land the subject of Bungoma/ Tongaren/ 279 belonged to Wanyonyi. I am persuaded that the parcels of land which the protestor claims belong to the deceased do not belong to the deceased. He who alleges a fact has the onus of proving the said fact. The protestor did not adduce any evidence to show that the deceased was about to bequeath the said parcels of land to the deceased or that he had a will bequeathing the said parcels of land to his 3 sons who are now deceased.

11. The next issue is the distribution of the deceased's only asset parcel number Bungoma/ Kamokoiwa/ 322. Section 38 of the *Law of Succession Act* cap 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”.

12. The only beneficiaries left are the children of the deceased. Three sons have died but the respective families as per the affidavits filed have agreed on the respective representatives. Looking at both proposals by the 2 petitioners, the mode of distribution by Dickson is supported by the law. The protestor has failed to persuade this court that he is entitled to a larger share of that the other beneficiaries are not entitled to share of the land which belonged to the deceased. Being his children, they are entitled to a share of his property even if they have their portions of land.

13. The land parcel for distribution is Land Parcel Number Bungoma/ Kamokoiwa/ 322. I, therefore, confirm the grant issued on the 20th of July 2022 in the names of Dickson Wafula Wanyonyi and Vincent Wanyama Ndombi as follows;

- i. Dickson Wafula Wanyonyi to get- 1.64HA
- ii. Joseph Manyandio Mukusi to get -1.64HA
- iii. Boaz Wekesa Wafula to get - 1.64HA
- iv. Vincent Wanyama Ndombi to get- 1.64HA
- v. Patrick Wanjala Ndombi to get - 1.64HA

14. This being a family matter, each party to bear its own costs;

DATED, SIGNED, AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 31ST DAY OF JANUARY 2024.

R.OUGO

JUDGE

In the presence of:

Miss Chunge For the 1st Petitioner

Mr. Kundu For 2nd Petitioner



