



In re Estate of John Namianya Munialo alias Namianya Munialo - Deceased (Succession Cause 390 of 2010) [2024] KEHC 2019 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2019 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 390 OF 2010
DK KEMEL, J
FEBRUARY 22, 2024
IN THE MATTER OF THE ESTATE OF JOHN NAMIANYA
MUNIALO (ALIAS NAMIANYA MUNIALO-DECEASED)
GRABRIEL WANYONYI WEKESA
AGNES NELIMA WAFULA
EMMANUEL MARAUNI WAMUKONYE.....APPLICANTS
VERSUS
JULIUS W. NAMIANYA
ABEL WALEKHAWA NAMIANYA.....RESPONDENTS

JUDGMENT

1. The Petitioners/Respondents herein were granted letters of administration on 20th September 2011 with regard to the estate of the deceased herein who died on 6th March 1976. The estate of the deceased comprised of two properties namely: Bokoli/Chwele/982 and Bokoli/Chwele/985. The Grant was subsequently confirmed on 26th October 2012. The parcel known as Bokoli/Chwele/985 was distributed to Timothy Wanyonyi Namianya and Julius W. Namianya while parcel Bokoli/Chwele/982 was distributed to Abel Walekhwa Namianya and Henry Wamalwa Namianya.
2. Although land parcel Bokoli/Chwele/982 was registered in the name of the deceased herein, the Objectors/Applicants were in occupation of the same. They realized that they had been excluded by the Petitioners/Respondents herein in the distribution of the estate of the deceased herein. This prompted them to file the summons for revocation of grant on 30th August 2017 on the grounds that the same was obtained via defective proceedings and by concealment of material facts.
3. The application was grounded upon the supporting affidavits of the Applicants herein. In a nutshell, they averred that the Grant issued and confirmed by the court was defective in substance as the same excluded the following beneficiaries: Gabriel Wanyonyi Wekesa, Agnes Nelima Wafula and Emmanuel



Marani Wamukonye. According to the affidavits, the 1st and 2nd Applicant's are the grandchildren of the deceased herein while the 3rd Applicant is the son of the deceased.

4. Opposing the summons, the Petitioners/Respondents vide a replying affidavit sworn on 28th March 2023, by Julius W. Namianya averred that the Applicants herein are just neighbours who interfered with the deceased's land boundary and encroached on the same. He averred that they have no family links or clan relationship to the Objectors. He averred that the proposed mode of distribution did not exclude any beneficiaries to the deceased's estate.
5. The summons herein was canvassed by way of viva voce evidence.

Objectors/Applicants case

6. OB-PW1 was Emmanuel Marani Mukonye who testified that he is the 3rd Objector herein and wished to rely on his recorded statement dated 30th August 2017 as well as his witness statement dated 14th July 2023 as his evidence-in-chief. According to him, he was the son of one Musa Wamukonye Munialo who died in 1994 and that the deceased herein and the late Musa Wamukonye Munialo were brothers. He stated that the deceased jointly bought two parcels of land L.P No. Bokoli/Chwele/982 and 985. It was his evidence that during their lifetime the deceased herein held the parcel L.R No. Bokoli/Chwele/982 in trust for the family of the late Charles Hulula Simiyu and Musa Wamukonye Munialo.

On cross-examination, he testified that his father was the late Musa Wamukonye Munialo and that Charles Simiyu Hulula is his cousin and that his father was the late Hulula Nyukuri Mukanda. According to him, the deceased herein followed his father, as his father was the eldest, and that he jointed this case as the land ought to be shared jointly. He testified that the deceased herein held the two parcels of land in trust as the same was jointly purchased with his father. He testified that he did not have a sale agreement over the land and the respective green card but he availed a search certificate.

On re-examination, he testified that he was born on the suit land and reiterated that the deceased herein and his late father jointly bought the land and were in good terms. Further, he testified that his father was farming on the said land and that his late father was buried in another land.

7. OB-PW2 was Murefu Munialo who adopted his recorded witness statement dated 14th July 2023 as his evidence-in-chief. According to him, the 1st Objector, Gabriel Wanyonyi Wekesa is the son of Charles Hulula Simiyu, now deceased, and that the 2nd Objector, Agnes Nelima Wafula, is the widow of Joachim Wafula Simiyu, who was the son of Charles Simiyu Hulula. He stated that the Objectors/Applicants are the brothers to the Petitioners and that the deceased herein was holding land parcel No. Bokoli/Chwele/982 in trust for Charles Hulula and Musa Wamukonye as he happened to be present during the early registration of land adjudication. He added that the parcel was already demarcated with the 1st portion measuring 1.2 Ha being occupied by the deceased and the 2nd portion measuring approximately 2.40 Ha by the late Musa Wamukonye.

On cross-examination, he stated that the deceased herein was his brother and that his parcel 975 is close to that of the Petitioners. According to him, his father the late Munialo Wamutobi died in 1941 and that his elder siblings held the land in trust. He stated that the 3rd Objector is his nephew.

On re-examination, he stated that the Objectors reside near his plot number 975 and that the late Charles Simiyu subdivided the land to his children who included the 1st Objector and 2nd Objector's husband.

8. OB-PW3 was Gabriel Wanyonyi Wekesa who adopted his recorded witness statement dated 14th July 2023 as his evidence-in-chief and further relied on the documents annexed to his affidavit sworn on 13th May 2022. According to him, he filed the objection in these proceedings to claim interest on



behalf of his late father one Charles Hulula Simiyu who died on 16th October 2013. He testified that Charles Hulula Simiyu, Musa Wamukonye Munialo and John Namianya Munialo were cousins who purchased land parcel No. Bokoli/Chwele/985 and Bokoli/Chwele/982. He stated that the deceased herein was survived by Timothy Wanyonyi Namianya; Abel Walekhwa Namianya and Henry Wamalwa Namianya while the late Charles Hulula Simiyu was survived by Gabriel Wanyonyi Wekesa and Emmanuel Marauni Wamukonye represented the family of the late Musa Wamukonye Munialo. He testified that the boundaries of the said parcels for all the families settled there were well demarcated and that the family of the deceased herein filed the succession proceedings secretly without involving the other family members who were beneficiaries to the deceased's estate. He added that the grant issued to the Petitioner/Respondents herein ought to be revoked and a fresh grant be issued with an agreed mode of distribution.

On cross-examination, he stated that his father was the late Charles Simiyu Hulula and that the 2nd Objector was the wife to his brother the late Joachim Wafula Simiyu. According to him, the surveyor encroached into his portion inside parcel 982 by seven acres and that he claims the same. He stated that the deceased was one of his grandfathers.

On re-examination, he reiterated that his family's land should not be interfered with.

9. At the close of the Objectors case, the Court directed the parties to file and exchange their respective written submissions. Both parties filed and exchanged submissions.
10. I have considered the averments of the parties, and the mode of distribution of the deceased's estate that each proposes. I have also considered the submissions. In my view, the only issue for determination is whether this court ought to revoke the grant issued to the Petitioners on 20th September 2011.
11. I have considered the issues raised in this application. Section 76(a), (b) and (c) of the [Law of Succession Act](#) provides as hereunder:

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;
12. This inheritance is by descent. The claims of descent and all existing models and rules are set forth in the [Law of Succession Act](#) covering both real and personal property.
13. It is clear, based on the availed official search certificate, that the deceased herein was the bona fide owner of land parcels No. Bokoli/Chwele/982 and 985 prior to transmission process to the names of his respective beneficiaries. The Objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the Objectors' father. In my view, this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased's estate from obtaining letters of administration and having the same confirmed, as it was the case herein. The Objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The Objectors



also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

14. I do not think that these succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust, as alleged, is or ought to be the subject matter of a separate suit or proceedings. The Objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an estate by third parties.
15. It is imperative for this court to remind itself that succession proceedings are not the place to challenge the title of a deceased person or raise issues of trust in land. That is the jurisdiction of the Environment and Land Court pursuant to Article 162 of *the Constitution* and section 13 of the *Environment and Land Court Act* No. 19 of 2011.
16. In the end, the judgement of the ELC in case No. 319 of 2013 did not in any way ascertain the rights of the Objectors with regard to the claim of a trust but was solely focused on the issue at hand which was whether the Petitioners herein were by right in being granted the claimed permanent injunction against the Objectors. The Petitioner's claim was dismissed due to the dictates of Limitations of Actions, terming the suit time barred. This Judgement did not ascertain the rights of the Objectors with regard to their claim of trust.
17. It is therefore my view that these are not the appropriate proceedings in which the Objectors ought to stake a claim to their interests in the subject properties. Their claim falls squarely within the jurisdiction of the Environment and Land Court.
18. It is evident from the foregoing that the Objectors did not establish any ground to warrant the revocation of the grant as provided for under section 76 of the *law of Succession Act*.
19. In the foregoing premises, i find no merit in the summons for revocation of grant dated 12th September, 2017. The same is hereby dismissed with costs to the Petitioners/Respondents.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D.KEMEI

JUDGE

In the presence of :

Alofi for Khakula for Objectors/Applicants

Kweyu for Sichangi for Petitioners/Respondents

Kizito Court Assistant

