



REPUBLIC OF KENYA



In re Estate of Nakitare Wekesa Njurukani (Deceased) (Succession Cause 50 of 2001) [2024] KEHC 1692 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 50 OF 2001**

DK KEMEL, J

FEBRUARY 22, 2024

IN THE MATTER OF THE ESTATE OF NAKITARE WEKESA NJURUKANI (DECEASED)

JUMA WEKESA.....APPLICANT

VERSUS

WAFULA WEKESA NAKITARE.....1ST ADMINISTRATOR

JULIUS MUNANDA NAKITARE.....2ND ADMINISTRATOR

WILBERFORCE WEKESA.....3RD ADMINISTRATOR

ISAYA N. WEKESA.....4TH ADMINISTRATOR

RULING

1. This matter involves the estate of the late Nakitare Wekesa Njurukani who passed away on 2nd August 2009. He was survived by the following: Wafula Wekesa Nakitare, Julius M. Nakitare, Isaya Njurukani Wekesa, Jackson M. Wekesa, George Ellam Wekesa, Justus M. Wekesa, Tom Wanyonyi Wekesa, Wilberforce Mukonabi Wekesa, Juma Wekesa, Jacob Simiyu Wekesa, Protus Wasike Siricha, Wilson A.N.Wekesa, William Mayuu Wekesa, Tom Waliaula Nakitare, Patrick Wanjala Wekesa, Rael Wafubwa Nakitare, Martha Muliamoka Nakitare, Nabangi Nakitare, Mary Nyongesa Nakitare Florence Mukhwana Nakitare, Janet Nafula Nakitare, Agnes Nanjala Nakitare, Hellen Wekesa Nakitare and Rosah Nakitare. The deceased's estate comprised of the following assets namely: Ndivisi/Makuselwa/226, Ndivisi/Makuselwa/298, Ndivisi/Makuselwa/303 and Plot No. 5 Misemwa Market.
2. By consent the letters of administration were duly issued to Julius M. Nakitare, Isaya Njurukani Wekesa, Wilberforce Wekesa and Wafula Wekesa Nakitare on 25th September 2006.
3. On 3rd October 2007, the Protestor, Kennedy Wekesa, filed his affidavit in protest to the confirmation of the grant claiming that parcel number Ndivisi/Makuselwa/298 had been given to his deceased father, George Ellam Wekesa, by the deceased herein based on the consideration that his father the late George Ellam Wekesa bore a greater financial burden in the family of the deceased herein. He averred that the deceased's property was shared in the 'kimikoye' ceremony and that his late father, George



Ellam Wekesa, was allocated Ndivisi/Makuselwa/298 in accordance with the wishes of the deceased herein. Vide a judgement delivered on 7th March 2011, my learned colleague F.N. Muchemi J ordered that the protestor was entitled to inherit the share of his late father being, Ndivisi/Makuselwa/298.

4. Subsequently, a certificate of confirmation was issued on 7th March 2011, in which the distribution schedule was as follows:

Name	Description of property	Share of Heirs
NDIVISI/MAKUSELWA/303		
Julius Munanda Nakitare	4 acres	
William Mayu Wekesa	3.5 acres	
Justus Mutama Wekesa	3.5 acres	
Jackson Makhaso	6 acres	
Dismas Wanyonyi	3 acres	
Wilberforce Mukonambi	3 acres	
NDIVISI/MAKUSELWA/298		
Kennedy Elam Wekesa	Whole	
NDIVISI/MAKUSELWA/226		
Tom Mulongo	4 acres	
Wilson Wekesa	4 acres	
Isaya Wekesa Nakitare	3 acres	
Wafula Wekesa Nakitare	3 acres	
Juma Wekesa	3 acres	
Wanjala Wekesa	3 acres	
Musima Wekesa	3 acres	
Wasike Wekesa	3 acres	
PLOT NO. 5 MISEMWA MARKET		
Jackson Mutama Wekesa	Whole	



5. On 25th September 2011, summons for rectification of grant was filed by the Petitioners who alleged that the certificate of confirmation only listed four assets and excluded land parcel No. Ndivisi/Makuselwa/304 and which was thus not distributed. They further averred that the total acreage disclosed and distributed is not the correct acreage of the land parcels No. Ndivisi/Makuselwa/303 and Ndivisi/Makuselwa/226. The Petitioners sought to have the ruling of the court delivered on 7th March 2011 and the mode of distribution be reviewed.
6. On 29th September 2011, the court issued orders directing that the land parcels No. Ndivisi/Makuselwa/303, Ndivisi/Makuselwa/304 and Ndivisi/Makuselwa/226 be surveyed to confirm the acreage on ground.
7. On 24th April 2014, the Objector, Juma Wekesa, filed summons for revocation or annulment of grant dated 22nd April 2014 seeking to have the letters of administration issued to the four Administrators on 6th December 2004 and confirmed on 7th March 2011 be revoked and/or annulled. By consent, the Objector's application dated 22nd April 2014 was allowed and a fresh grant was to issue to the four comprising Administrators distributing the estate of the deceased herein land parcels measuring a total of 48.5 acres as follows:



Name	Description of property	Share of Heirs
NDIVISI/MAKUSELWA/226 measuring 21 acres		
Tom Waliaula Nakitare	4 acres	
Wilson Anthony Wekesa	3 acres	
William Mayu Wekesa	3.5 acres	
Wafula Wekesa Nakitare	3.5 acres	
Patrick Wanjala Wekesa	3.5 acres	
Protus Wasike Nakitare	3.5 acres	
NDIVISI/MAKUSELWA/298		
Kennedy Elam Wekesa	Whole	
NDIVISI/MAKUSELWA/226 measuring 6.1 acres		
Isaya Wekesa Nakitare	2.05acres	
Juma Wekesa	2.05acres	
Jacob Simiyu M. Wekesa	2 acres	
NDIVISI/MAKUSELWA/303 measuring 20 acres		
Charles Wekesa	4 acres	
Kennedy Elam Wekesa	3 acres	
Julius Munanda Wekesa	4 acres	
Justus Martin Wekesa	3 acres	
Wilberforce M. Wekesa	3 acres	
Tom Wekesa	3 acres	
PLOT NO. 5 MISEMWA MARKET measuring 1.4 acres		



8. On 8th July 2019, my learned colleague, S.N. Riechi J, issued orders directing that this file be closed as the same had been inactive for one year.
9. Vide a notice of motion application, the Objector, Juma Wekesa, sought orders to have this court set aside the orders issued on 8th July 2019 and that the Objector's application for revocation and annulment of grant filed in court on 24th April 2014 be set down for hearing on priority basis.
10. The notice of motion application dated 26th June 2020 was set down for hearing but based on my perusal of the court record, the same did not proceed.
11. On 23rd February 2021, my learned colleague, S.N. Riechi J, ordered by consent of the parties that the County Land Surveyor do survey the parcels of lands belonging to the estate of the deceased herein to ascertain the actual acreage on the ground and the acreage occupied by each beneficiary on the ground.
12. On 1st March 2021, the County Surveyor's Office at Bungoma vide a correspondence to the area chief Namarambi Location notified the beneficiaries of the estate of the deceased that he would be visiting the land parcels No. Ndivisi/Makuselwa/303, 304, 298 and 226 for purposes of implementing the court order as issued. The area chief was to bear witness to the exercise.
13. Upon completion of the survey exercise, the Bungoma County Surveyor prepared a report which was shared with the Deputy Registrar of this court. According to the report, he visited land parcels No. Ndivisi/Makuselwa/303, 304, 298 and 226 on 12th March 2021 and 13th March 2021. The report indicated that most of the beneficiaries including the area chief and assistant chief were present but the following beneficiaries did not attend the exercise: Kennedy Elam Wekesa, Julius Munanda Wekesa, Justus Wekesa and Jacob Simiyu Musima Wekesa. His report highlighted that land parcel No. Ndivisi/Makuselwa/226 acreage is 8.84 Ha (21.84 acres), No. Ndivisi/Makuselwa/304 acreage is 0.51 Ha (1.3 acres) and No. Ndivisi/Makuselwa/298 acreage is 2.44 Ha (6.03 acres).
14. On review of the said surveyor's report, the 3rd and 4th Administrators registered their opposition vide an affidavit of protest suggesting that the assets of the deceased ought to be distributed equally amongst the four houses taking into consideration Mr. William Wanyonyi Ndoli who is the creditor to the estate of the deceased herein. They noted that prior to his demise, the deceased had already apportioned each heir their respective portions of land and that each has maintained the occupation of the same to date as captured in the surveyor's report. They concurred with the surveyor's report but noted that the same did have a few errors.
15. Juma Wekesa, filed a further affidavit on the contents of the surveyor's report where he averred that the surveyor's report confirmed the manner in which the deceased had allocated his four parcels of land to his sons and that it was certain that the acreage as captured on the certificate of confirmation in respect of the various beneficiaries is more than what is available on the ground.
16. The 2nd Administrator, Julius Munanda Wekesa, contended the surveyor's report as according to him, the same had only one aim which is to disinherit members of one house and increase acreage of the others and also move beneficiaries who sold all their shares in land parcel No. Ndivisi/Makuselwa/226 so that they can encroach on land parcel No. Ndivisi/Makuselwa/ 298 that belongs to Kennedy Ellam Wekesa.
17. Kennedy Wekesa, on the other hand contended with the surveyor's report noting that the same was influenced with a view to denying him the benefit of a successful litigation.



18. The 1st Administrator, Wafula Wekesa Nakitare, vide his affidavit in protest, averred that he contended with the surveyor's report on the aspect of acreage and the occupation of some of the beneficiaries in some parts of the deceased's properties.
19. On 13th March 2023, the 1st Administrator, Wafula Wekesa Nakitare, filed a notice of motion seeking to have Justus Martin Mutama Wekesa appointed as an administrator in place of the 2nd Administrator, Julius Munanda Nakitare, who died in 2022. On 3rd October 2023, this court did issue the grant of letters of administration intestate substituting Justus Mutama Wekesa as the 2nd Administrator.
20. Upon careful consideration of this application and the rival submissions by the parties, i take this view of the matter. At this stage, i need not intrude into whether or not the surveyor's report is purporting to disinherit some of the beneficiaries of the deceased. What is of paramount concern to the court is whether rectification herein should be allowed in the manner sought by the Protestor, Kennedy Wekesa. The core essence of the surveyor's report was to ascertain the actual acreage on the ground and the acreage occupied by each beneficiary on the ground. Section 74 of the *Law of Succession Act* provides for the circumstances under which a grant may be rectified as follows:-

“Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”
21. The core essence of rectification by this court is not to venture on the already distributed property. These matters are not a trifle. They are serious matters, and when they are raised in succession proceedings, the court must seek specific reconciliation thereof in the interest of justice. In this case, this court was called upon to rectify the acreage of an asset of the estate based on the surveyor's report and to also distribute parcel Ndivisi/Makuselwa/304 which had been left out of the distribution schedule by this court.
22. There is clearly no consensus on the actual size of the land which is to be subdivided between the beneficiaries. In any event, going back to section 74 of the Act, it refers to errors and misdescriptions, time and place of deceased's death. What the Applicant is proposing is a redistribution of the entire estate since the basis of surveyor's report of the acreage of the land in question, the portion of land to be allocated to each beneficiary will of necessity have to change. Section 74 is not available for purposes of redistribution of the entire estate.
23. For the reasons set out above, i find the application dated 21. 9. 2011 seeking rectification of grant is misplaced. Rectification cannot be used to add to the beneficiaries of an estate and/or to redistribute the entire estate. What the Applicant is seeking is an entire re-distribution of the estate and not mere rectification of errors. In the circumstances, i find no merit in the summons for rectification of grant. The same must be dismissed in its entirety.
24. Having arrived at the foregoing, this court is however mindful of the fact that it is the legal duty of administrators to distribute the estate of the deceased to the named beneficiaries. It is clear that there is no meeting of minds between the administrators of this estate. It transpired that most of the beneficiaries have sold their portions to third parties and are now angling to get more shares in the proposed rectification to the prejudice of other beneficiaries. The question of the true acreage of land to be sub-divided still remains contentious but the surveyor's report has established what stands on the ground as the true acreage of the subject properties Ndivisi/Makuselwa/226, 304 and 298.



25. From the foregoing, the grant confirmed by the court on 7th March 2011 cannot be rectified under section 74 of the [Law of Succession Act](#) to include the land parcel No. Ndivisi/Makuselwa/304 or to redistribute the estate as per the information provided by the surveyor's report on the actual acreage of parcels Ndivisi/Makuselwa/226, 304 and 298.
26. In the upshot, i find the application for rectification of grant dated 21.9.2011 is devoid of merit. The same is dismissed with no order as to costs.

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

D. KEMEI

JUDGE

In the presence of:

Murunga for Objector/Applicant

No appearance for 1st Administrator

No Appearance for 2nd Administrator

No Appearance for 3rd Administrator

No appearance for 4th Administrator

No appearance for Protestor

Kizito Court Assistant

