



REPUBLIC OF KENYA



**Wanjala & 5 others v Nabibia & 5 others (Succession Cause
10 of 2018) [2024] KEHC 6259 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 10 OF 2018**

DK KEMEL, J

MAY 30, 2024

BETWEEN

**CONCEPTA KHANJILA WANJALA 1ST APPLICANT
RICHARD WEKHOMBA NABACHENJA 2ND APPLICANT
GABRIEL MUCHUMBELI 3RD APPLICANT
GRACE NYONGESA 4TH APPLICANT
PIUS WAFULA MWEMBE 5TH APPLICANT
METRINE WAFULA 6TH APPLICANT**

AND

**BENJAMIN MASIBO NABIBIA 1ST RESPONDENT
AGNES NASOMBI WANYAMA 2ND RESPONDENT
JOHN WASIKE 3RD RESPONDENT
MARY WASIKE 4TH RESPONDENT
MARY WASIKE 5TH RESPONDENT
MURUMBA WANGAMATI 6TH RESPONDENT**

RULING

1. The amended summons for nullification, review and/or setting aside of proceedings, orders and/or judgement and/or decree application, subject of this ruling, is dated 9th November 2023. It is supported by the affidavit of Concepta Khanjila Wanjala and grounds on the face of the application.
2. The application seeks the following orders: -



- i. That this Honourable Court be pleased to review, annul, vary and/or set aside the proceedings, judgement and/or decree passed and/or taken in this matter since its transfer from the Magistrate's Court to this Honourable Court up till the judgement delivered on 28th July 2023.
 - ii. That this Honourable Court be pleased to declare that Bungoma Chief Magistrate's Court Succession Cause No. 6 of 2017 was and/or is a nullity that was not capable of being transferred into this Honourable Court and subsequently annul and/or invalidate all and/or any transactions carried out in respect to land reference number Kimilili/Kimilili/747 and land reference number Ndivisi/Makuselwa/518 on the strength of the judgment, orders and/or decree passed in this matter on 28th July 2023.
 - iii. That the costs of this application be in the cause.
3. From the grounds in support of the application, the Applicants claimed that they are beneficiaries in the estate of the deceased herein. According to the Applicants, subject to the determination of this court delivered on 28th July 2023, the County Surveyor summoned all the beneficiaries of the estate of the deceased to attend during the exercise of sub-division of the only parcels of land registered in the name of the deceased herein. They averred that the planned survey will prejudice the rights of the Applicants. The Applicants averred that the proceedings commencing the filing of the Succession Cause at the Chief Magistrate's Court at Bungoma and its subsequent transfer to this Honourable Court as well as those leading to the now impugned judgement completely ignored that the estate of the deceased was way beyond the pecuniary jurisdiction of any magistrate. The Applicants averred that the exclusion of the 1st Applicant and discovery of documents drawn and/or signed on record warrants this court to grant the orders sought. The Applicants averred that the impugned proceedings and/or judgement was also likely tainted by fraud perpetrated by some of the litigants involved.
 4. The 1st Applicant filed a further affidavit in support of the amended summons averring that the Chief Magistrate's Court at Bungoma lacked the pecuniary jurisdiction to entertain the cause involving the deceased's estate and that the proceedings commencing from the filing of the Succession Cause at that forum to its transfer to the High Court as well as those leading to the impugned judgement were null and void.
 5. Vide an undated replying affidavit, the 1st Respondent concurring with the application, averred that the proceedings from the Bungoma Chief Magistrate's Court to this court leading to the impugned Judgement delivered on 28th July 2023 were null and void and that in the absence of valid proceedings in respect of the estate of the deceased, no person was validly appointed as an administrator of the estate of the deceased herein.
 6. The application was canvassed by way of written submissions. Both parties filed and exchanged their written submissions.
 7. Having considered the parties application, responses and the written submissions, the only issue that lends itself for determination is whether the application is merited.
 8. Before delving into the substance of the application, a look at the law that donates power to this court to transfer cases is of paramount essence.
 9. The transfer of cases from one court of the magistracy to another is a supervisory function of the High Court codified in Article 165(6) and (7) of the Constitution in the following terms: -
 6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



6. For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
10. Pursuant to the foregoing, section 17 of the [Civil Procedure Act](#) (hereinafter ‘the CPA’) provides as follows: -

Power to transfer suits which may be instituted in more than one Court:

Where a suit may be instituted in any one of two or more subordinate Courts, and is instituted in one of those Courts, any defendant after notice to the other parties, or the Court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another Court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

11. Where a contest arises as to which court of the magistracy shall hear and determine such a dispute, section 17 mandates the High Court to decide which court to take over the conduct of the matters.
12. The import of section 17 of the [Civil Procedure Act](#) is an acknowledgement by the law that there are instances where a dispute may properly be instituted in two or more different courts of the magistracy.
13. Section 18 of the [Civil Procedure Act](#) further provides for transfer and withdrawal of cases before the magistracy. It provides as hereunder: -
18. Power of High Court to withdraw and transfer case instituted in subordinate court:
 1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding pending in any Court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
 2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
14. It can be distilled from the foregoing provisions that whereas section 17 of the [Civil Procedure Act](#) caters for transfer of cases in instances where one suit is capable of being instituted in two or more courts, section 18 of the [Civil Procedure Act](#) provides for the general power of the High Court to withdraw and transfer a case from one court to another irrespective of whether such suit may be instituted in more than one court or even the High Court can transfer such suit to itself and to try and dispose the same.



15. Section 48 of the *Law of Succession Act* grants the magistracy jurisdiction in succession disputes in the following manner: -

48. Jurisdiction of magistrates

- (1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this *Act*, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.

16. Reverting to the annexures to the application, it is elaborate that the estate of the deceased herein was surveyed at Kshs. 60, 760,000/= which is clearly beyond the requisite pecuniary jurisdiction of the Principal Magistrate C.A.S. Mutai. This simply means that he lacked the jurisdiction to entertain the same. Upon perusal of the court record, it is noted that the grant of letters of administration was duly issued in the Chief Magistrate's Court, Succession Cause Number 6 of 2017 and confirmed on 5th July 2018. On 7th November 2018, this court vide Justice S.N Riechi issued orders that the Bungoma CM Succession Cause No. 6 of 2017 be transferred to the High Court Bungoma for hearing and final determination. Indeed, the matter has been proceeding since then until this court issued the judgement dated 28th July 2023.

17. This court though differently constituted, proceeded to deliberate on an application dated 23rd August 2018, seeking to revoke the contentious grant that had been confirmed on 5th July 2018 and subsequent revocation of the resultant title deeds flowing from the said contentious grant. Justice S.N. Riechi had issued orders on 29th April 2019 directing that the grant that had been confirmed on 5th July 2018 be revoked.

18. This Court proceeded to hear on the mode of distribution of the estate of the deceased herein on 12th April 2023 and upon Judgement dated 28th July 2023, it made the following orders:

- i. That the Objector's Protest has merit and that the same is allowed.
- ii. That the deceased's estate to be shared equally between the two houses as follows:
 - a. LR. No. Kimilili/Kimilili/747- 25 Acres to be held in trust by Benjamin Masibo Nabibia on behalf of the 1st house and another 25 Acres to be held in trust by Agnes Nasombi Wanyama on behalf of the 2nd house.
 - b. LR. No. Ndivisi/Makuselwa/518-13 Acres to be held in trust by Benjamin Masibo Nabibia on behalf of the 1st house and another 13 Acres to be held in trust by Agnes Nasombi Wanyama on behalf of the 2nd house.
- iii. That parties to engage the County Surveyor -Bungoma who will visit the two land parcels, LR. No. Kimilili/Kimilili/747 and LR. No. Ndivisi/Makuselwa/518 and carry out exercise of subdivision which ensures that all developments on the ground and occupation are considered so as to leave minimal disruption.



- iv. Each Party to bear their own costs.
19. From the foregoing, it is elaborate that this court orders were not made in tandem with the contentious grant that was confirmed on 5th July 2018 but later revoked vide judgement of the court issued on 28th July 2023 and further by the fact that the said grant had already been revoked by Riechi J on April 29, 2019.
20. It is therefore clear that any party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 of the *Civil Procedure Rules*. The substantive provisions of Order 45, state as follows:

“ 1.

- (1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed,
- and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) ...”

21. Order 45 provides for three circumstances under which an order for review can be made. To be successful, the Applicant must demonstrate to the court that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.
22. From the above, it is clear that the error the subject of the application ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. The issue of non- declaration of this court that a fresh grant be issued in the names of Benjamin Masibo Nabibia and Agnes Nasombi Wanyama is, in my view, a substantial issue that can be regarded as an error apparent on the face of the record. However, this is not the reason the Applicant is relying on in her application. The Applicants’ main ground is that the Chief Magistrate’s court had no pecuniary jurisdiction to entertain the cause and could not thereby



transfer it to this court. This court already caused the matter to be transferred to it and has handled it all through leading to the judgement dated 28th July, 2023. Hence, even though such a prayer had not been sought, this court has inherent power donated by Rule 73 of the Probate and Administration Rules and section 47 of the Law of Succession Act to make orders that are appropriate in order to meet the ends of justice.

23. It is clear that when this court proceeded to revoke the grant but failed to make it elaborate that a fresh grant of letters of administration was to be issued to Benjamin Masibo Nabibia and Agnes Nasombi Wanyama, and a certificate of confirmation of grant shall issue to the two administrators, this clearly brought about the illusion that this court based its judgement delivered on 28th July 2023 on a contentious grant that was confirmed on 5th July 2018. Indeed, the petitioners and their witnesses presented their evidence during the hearing of the protest in the honest belief that there was a fresh grant issued to the petitioners herein.
24. On the issue of the parties herein being aggrieved by the decision of this court dated 28th July 2023, it is clear that the wheel of justice is still spinning and that they can take advantage of the same by submitting their appeal against my decision in the proper forum which is the Court of Appeal. Indeed, the Applicant herein had initially sought for orders of stay of execution of the judgment pending an appeal to the Court of Appeal before she filed an amended application seeking for review, annulment, varying and setting aside of the proceedings and judgement, orders/ decrees from the magistrate's court up to the judgement of this court dated July 28, 2023 and further for an order that the magistrate's court lacked jurisdiction to entertain the cause. As noted above, this court did order for the transfer of the cause from the magistrate's court to this court for determination. Up to that point, the proceedings became regularized and thus this court had the requisite jurisdiction to entertain the matter. Hence, the Applicants' application based on jurisdiction lacks merit. The Applicant ought to move to the Court of Appeal as she had earlier intimated for redress. This Court does not find this application to be merited.
25. In the upshot, i find that the High Court has jurisdiction under the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate & Administration Rules to issue such orders and decrees as may be expedient and necessary for the ends of justice. Under section 45 (1) & (2) of the Law of Succession Act (Cap 160), this Court has powers to protect the assets of a deceased person. This court has power of review and to issue the fresh grant to the two petitioners herein even as the parties pursue their legitimate rights of appeal in the Court of Appeal. However, in my view, only an administrator or an interested party in an existing administration cause, can apply for protection of the deceased's assets. In efforts to ensure proper administration and distribution of the estate of the deceased herein and to ensure that the estate is not left unattended, this court will issue appropriate orders for the ends of justice. The following orders are hereby issued:
 - a. The Applicant's amended application dated November 9, 2023 is dismissed.
 - b. The judgement of this Court dated on 28th July, 2023 is reviewed to the extent that a fresh grant of letters of administration be and is hereby issued in the names of Benjamin Masibo Nabibia and Agnes Nasombi Wanyama.
 - c. A certificate of confirmation of grant shall issue to the two administrators.
 - d. Each party to meet their own costs.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF MAY 2024.

D. KEMEI



JUDGE

In the presence of:

Malanga for Applicants

Benjamin Masibo for 1st Petitioner/Respondent

No appearance Paul Juma for 2nd Petitioner/Respondent

Malanga for Wakhaka for 3rd Respondent

No appearance Mary Nekoye 4th Respondent

..... for 5th Respondent

..... Court Assistants

