



**Munyasi & 3 others v Mbalanya & 2 others (Succession Appeal
E006 of 2022) [2024] KEHC 6232 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E006 OF 2022
WM MUSYOKA, J
MAY 29, 2024**

BETWEEN

**MARY MUNYASI 1ST APPELLANT
JOYCE WANDERA 2ND APPELLANT
CHRISTINE OMANYO 3RD APPELLANT
EUNICE OMANYO 4TH APPELLANT**

AND

**LUCY MBALANYA 1ST RESPONDENT
DAVIS OMANYO 2ND RESPONDENT
ABRAHAM OMANYO 3RD RESPONDENT**

*(an appeal arising from orders made in the ruling of Hon. PA Olengo, Senior
Principal Magistrate, SPM, in Busia CM CSC No. 27 of 2016, of 7th October 2022)*

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CM CSC No. 604 of 2018, of 7th October 2022. The grounds of appeal revolve around the trial court declaring the objections by the appellants res judicata without evidence; that the trial court erred in finding that there was concealment of matter from court by the petitioner as the ground for revoking the grant; the trial court failed to find that the objectors were not involved in the administration of the estate of their father; the trial court ignored the evidence adduced by the appellants; and the trial court failed to find that the objectors were not given a share from the estate of their father.
2. The orders, which form the basis of the appeal, were made on an application dated 29th June 2021, for revocation of grant. There were other prayers: that the title deeds arising out of Samia/Bukangala



“A”/1026 and 1046 be cancelled, a permanent injunction to restrain the 1st respondent herein from intermeddling with the estate of the deceased, and a fresh succession to be carried out in respect of the estate of the deceased. The trial court noted that the 1st respondent was appointed administratrix, after citations were issued, and those who should have petitioned, that is to say the 2nd and 3rd respondents herein, failed to take out representation as directed by the court. The said 2nd and 3rd respondents then sought revocation of the grant made to the 1st respondent, and the court made the 2 co-administrators with the 1st respondent. The administrators were not able to agree on a joint application for confirmation of grant, so the 1st respondent filed one alone. Protests were filed against it, which the court dismissed. The court opined that the 2nd and 3rd respondents were trying everything in the book to have the grant revoked, and was of the view that their revocation application was res judicata, as the issues raised in it were the same as those raised in the protests, yet no appeal had been filed against the confirmation orders. The revocation application was dismissed, for being res judicata.

3. The appellants were aggrieved; hence they filed this appeal, vide a memorandum of appeal, dated 7th October 2022, lodged herein on 11th October 2022.
4. The appeal was canvassed by way of written submissions, filed by both sides, which I have read and understood. I have noted the arguments made, and the authorities cited.
5. My understanding of the appeal is that the appellants are aggrieved that the trial court did not quite hear them out, and was more swayed by what had previously happened in the succession cause, as basis for dismissing their revocation application.
6. A little history may help. The deceased died in 1985. The cause before the trial court, was initially filed as Bungoma HCSC No. 81 of 2012, by the 1st respondent herein, in her capacity as daughter-in-law of the deceased. She listed 7 individuals as survivors of the deceased, namely herself, the late Joseph Joshua Omanyoo, Abraham Wangiri, Joseph Barasa Omanyoo, David Omanyoo, Samuel Omanyoo and Amos Omanyoo. Except for herself, the relationship between the deceased and the 6 is not defined in the petition. The deceased was said to have died possessed of Samia/Bukangala “A”/52 and Ganjala Trading Centre Plot No. 4. There is a letter, from the Chief of Nambuku Location, dated 8th February 2012, which describes the 5 as sons of the deceased. The 5 include the 2nd and 3rd respondents herein. The letter also identifies the 1st respondent as a daughter-in-law of the deceased, on account of her capacity as widow of a late son of the deceased, known as Joshua Omanyoo. The Chief indicates that the widow of the deceased, Jesca Omanyoo Obura, was alive then. On 8th February 2014, another petition was filed, by the 1st respondent herein, expanding the names of the survivors, and including the relationships between them and the deceased. The new inclusions were of a son, George Omanyoo, and a daughter, Jesca Omanyoo. Letters of administration intestate were made to the 1st respondent on 20th February 2014, and a grant was duly issued, bearing an even date. The 1st respondent applied, vide a summons dated 5th September 2014, for confirmation of her grant. She proposed that the estate be shared out equally between the 8 sons of the deceased, including her late husband. The name of Jesca Omanyoo, mentioned in the Chief’s letter and the 2nd petition, as widow and daughter, respectively, did not feature in that confirmation application.
7. Bungoma HCSC No. 81 of 2012 was subsequently transferred to Busia, vide an application, dated 15th October 2015, where it became Busia HCSC No. 17 of 2016. Busia HCSC No. 17 of 2016 was subsequently transferred to the Busia Chief Magistrate’s Court, vide an order made on 11th February 2016. It became Busia CMCSC No. 27 of 2016.
8. A summons for revocation of grant, dated 4th May 2016, was then lodged at the registry, by Davis Omanyoo, jointly with the other sons of the deceased, namely Samuel Omanyoo, Abraham Omanyoo,



Joseph Omanyo, George Omanyo and Amos Omanyo. Their case was that their consents were not sought and obtained before the 1st respondent approached the court for representation. They also complained that the daughters of the deceased had not been included in the process. They further argued that the consent on record, supporting the confirmation application, was a forgery. They asserted that the court was misled, and there was non-disclosure of material information. The Chief Magistrate revoked the grant made to the 1st respondent, by an order she made on 6th June 2016, and appointed the 3 respondents, in this appeal, administrators of the estate. A grant was duly issued to the 3, dated 1st July 2016.

9. The 1st respondent filed a summons for confirmation of the grant of 6th June 2016, for distribution of Samia/Bukangala “A”/52 and Ganjala Trading Centre Plot No. 4, equally, between all the 7 sons of the deceased. That application was opposed. The 6 surviving sons of the deceased argued that it was premature, and no consents had been filed, and some heirs had been excluded. The 1st respondent countered, by saying that the distribution of the land had been agreed upon prior to representation being sought, and annexed a document dated 31st December 1998 in support, where elders had allegedly shared out the land amongst the 7 sons of the deceased. There was a protest, by Mary Auma Bunyasi, a daughter of the deceased, by an affidavit sworn on 2nd November 2017, where she disclosed that the deceased had 12 children, being 7 sons and 5 daughters. Her case was that the daughters had not been included in the matter of distribution. She proposed that the land be held in joint title. Another protest, by the 2nd respondent, herein, was word for word that of Mary Auma Bunyasi. In the end, the court shared out the 2 assets in accordance with the proposals made by the 1st respondent in her confirmation application, and a certificate of confirmation of grant was duly issued in those terms, dated 26th September 2018.
10. It was after the confirmation orders, of 26th September 2018, were made that 2 revocation applications, one of which gave rise to the orders the subject of this appeal. The first application was filed, on 5th July 2019. The applicant was Joseph John Omanyo. His case was that when representation was sought some heirs were left out. He also argued that strangers were listed as beneficiaries, and were allocated shares in the estate at confirmation. He disclosed that the deceased had married twice, and so he was a polygamist, and that he had a total of 12 children, being 9 sons and 3 daughters. Joseph Protus Omanyo was described as a stranger, and the process of obtaining representation was said to have been done secretly. The application dated 5th July 2019, was never determined, although oral evidence was taken from some witnesses. It was being handled by Hon. Temu, Principal Magistrate, and it would appear that it was forgotten or abandoned after he was transferred out of Busia. It would also appear that it was overtaken by the events of the filings of the applications thereafter, for joinder of parties and revocation. The application which gave rise to this appeal is dated 29th June 2021, and it was filed herein on 30th June 2021, by the daughters of the deceased. Their principal complaint was that all the survivors of the deceased were not disclosed. Oral hearings were conducted, and eventually a ruling was delivered, on 7th October 2022, on the basis that the matter was res judicata the previous decisions, and the revocation application was dismissed.
11. The principal consideration herein should be whether the trial court should have dismissed the revocation application, dated 5th July 2019, on the basis of the res judicata principle. Res judicata is about the court not determining issues that have already been determined previously by the court or courts. See *William Odhiambo Ramogi & 3 others* Mombasa HC Constitutional Petition No. 159 of 2018 (Achode, J. Ngugi, Nyamweya, Ogola & Mrima, JJ)(unreported), *The Speaker of the National Assembly of Kenya & another vs. The Senate of the Republic of Kenya & 7 others* [2021] KECA 282 (KLR)(Murgor, Nyamweya & Lesiit, JJA), *CK Bett Traders Limited & 2 others vs. Kennedy Mwangi & another* [2021] eKLR (Mwita, J), *Musankisbay Kalala Paulin vs. Director Criminal Investigations & 4*



- others* [2022] eKLR (Mrima, J) and *Dina Management Limited vs. County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) (21 April 2023)(Mwilu DCJ&VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ).
12. The common issue, in the revocation application, dated 4th May 2016; the protest to the confirmation application, dated 6th June 2016; and the revocation application of 5th July 2019, is about certain heirs being left out.
 13. I have read and re-read the rulings on those 3 applications, and I have not come across a determination on that common issue. These proceedings, from initiation, were about the sons of the deceased, the 7 of them, yet the deceased also had 5 daughters. The names of the 5 daughters were not listed in the Chief's letter, nor in the petition, nor in the confirmation application. The issue of their existence was raised in all the 3 applications, yet the trial court, in its rulings on the 3 applications, made no determinations on the exclusion of the daughters, on whether they were entitled to a share in the estate, whether they were entitled to apply for representation to the estate of their father, whether those applying should have obtained their consents or renunciation or served them with citations before applying, among others. These issues were critical, for they are required by the law in section 51(2)(g) of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rules 7(7) and 26 of the *Probate and Administration Rules*. These procedures are mandatory. The issue was raised by the parties, but was ignored by the trial court. Since the trial court, in the previous 2 occasions, ignored the issue, and did not address it, meant that the res judicata principle could not be raised in the ruling of 7th October 2022. *Res judicata* cannot apply to an issue that the court had not previously ruled upon, even if that issue had come up previously. It is not about the issue having been previously raised or litigated upon, but rather about the court having previously determined or ruled upon it.
 14. Did the appellants have a valid claim? They did. The deceased herein died in 1985, some 4 or 5 years after the *Law of Succession Act* had come into force on 1st August 1981. Under section 2(1) of the *Law of Succession Act*, the said Act applies universally in Kenya, effective from the date of its commencement. There are certain exceptions made, with regard to its application, in sections 2(2)(3)(4), 32 and 33 of the *Law of Succession Act*. However, none of these exceptions apply to property situate within Busia County. The exceptions relate to estates of persons who died before the Act commenced on 1st July 1981, to estates of persons who died Muslim, and to estates of persons who reside in the territories the subject of Gazette Notice No. 94 of 1981, respectively. That then means that the *Law of Succession Act* applies to estates of persons who die resident within Busia County, and who own property within Busia County.
 15. The deceased herein died intestate, for no will or testament was produced as evidence that he died testate, and no oral will was proved. As he died after 1st July 1981, his estate is for distribution in accordance with the intestacy provisions in Part V of the *Law of Succession Act*. Section 38 in Part V of the Act would apply. It caters for how the intestate estate is to be distributed, where the deceased was survived only by children, it should be shared equally between the children. See *Michael Mwangi Joram vs. Robin Njue Njagi* [2016] eKLR (Muchemi, J), *In re Estate of Karuri Magu (Deceased)* [2016] eKLR (Mshila, J) and *Mark Savakama Werafichi vs. Joice K. Savakama* [2016] eKLR (Sitati, J). The deceased died a polygamist, and section 40(1) may apply, which provides for the sharing of the estate of an intestate polygamist. See *Rono vs. Rono & another* [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA). However, section 40(2) of the Act refers back to section 38, and there would be no necessity to invoke section 40(1), for the court can quite properly deal with the estate under section 38 of the *Act*.



16. Section 38 provides for equal distribution of the estate amongst the children of the deceased. Children, for the purposes of the Law of Succession Act, does not mean boys or sons, and it does not exclude girls or daughters. The word children must be read in its ordinary natural sense, to mean children of both genders. See In Re Estate of Susan Wakonyo Kabio (Deceased) [2005] eKLR (Muga Apondi, J), James Maina Anyanga vs. Lorna Yimbiba Ottaro & 4 others [2014] eKLR (Emukule, J), Gulzar Abdul Wais vs. Yasmin Rasbid Ganatra & another [2014] eKLR (Lesiit, J), Stephen Gitonga M'Murithi vs. Faith Ngira Murithi [2015] eKLR (Waki, Nambuye & Kiage, JJA), In re Estate of Michael Waweru Gitau (Deceased) [2018] eKLR (Muigai, J), In re Estate of Festo Lugadiru Abukira (Deceased) [2019] eKLR (Musyoka, J), In re Estate of Lusila Wairu Waweru (Deceased) [2020] eKLR (Nyakundi, J), In re Estate of Mbiyu Koinange (Deceased) [2020] eKLR (Muchelule, J) and In re Estate of Chepleke Chemusany (Deceased) [2020] eKLR (Sitati, J). I am not aware of any judicial determination, and none has been placed before me, which defines children, for the purposes of the Law of Succession Act, to mean children of the male gender. That then means that children mean both sons and daughters, and it means that both sons and daughters are entitled to share the property of their dead intestate parent, equally. In this case, the 5 daughters of the deceased were not reckoned. They were allocated nothing, and they were not involved at all in the proceedings. When that issue was raised before the trial court, it was ignored, and the trial court proceeded as if no such issue had been flagged.
17. The fact that the daughters of the deceased were not disclosed, when representation was sought, and when the confirmation application was mounted, should have prompted the trial court to take some action, to bring the matter into compliance with section 51(2)(g) of the Act, which requires the disclosure of all the children of the deceased at the point representation is sought, and the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, which require the administrators to ascertain all the persons beneficially entitled to a share in the estate, and to ascertain their respective shares. The 5 daughters are children of the deceased, and, so, they should have been disclosed in compliance with section 51(2)(g) of the Act. See Martin Munguti Mwonga vs. Damaris Katumbi Mutuku [2016] eKLR (Thande, J), In re Estate of Margaret Nduta Maina (Deceased) [2018] eKLR (Muigai, J), In re Estate of Mary Karugi Mwangi (Deceased) [2018] eKLR (Meoli, J) and In re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR (Musyoka, J). Section 35 of the Act makes daughters persons who are entitled beneficially to a share in the estate of their parent, and, therefore, in the instant case, the appellants ought to have been ascertained, in compliance with the proviso to section 71(2) of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules, and the shares due to them, which are equal to those due to the sons, should have been ascertained. It was the role of the trial court to ensure compliance with these provisions. It failed to ensure that compliance. See In the Matter of the Estate of Ephrahim Brian Kawai (Deceased), Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported).
18. Related to that are the requirements in Rules 7(7) and 26 of the Probate and Administration Rules, with respect to petitions for representation by individuals who have no prior right to administration. See ETR vs. JKR [2015] eKLR (Kimondo, J), Monica Adhiambo vs. Maurice Odero Koko [2016] eKLR (Nagillah, J), In re Estate of Job Kibiwott Tanui (Deceased) [2016] eKLR (Kimondo, J), In re Estate of Gamaliel Otieno Onyiego (Deceased) [2018] eKLR (JA Makau, J) and In re Estate of Kageto Gitome (Deceased) [2018] eKLR (Muigai, J). The 1st respondent has no prior right to administer the estate of her late father-in-law. She is a daughter-in-law, and as such she features nowhere in the list of preference, set out in section 66 of the Law of Succession Act, which limits preference to the blood relatives of the deceased. She is not a blood relative of the deceased. The only connection that she has with the deceased is that she married his son. That, however, does not confer to her any rights over those of the children of the deceased. Her entitlement to the estate can only be through her deceased husband, the late son of the deceased. To access that right, she would need a grant to the estate of her late husband, to give her



locus standing to intervene in the estate of her father-in-law on behalf of her late husband. She, unlike the children of the deceased, has no direct claim or right to the estate, save through her husband. It has not been demonstrated that she has been appointed the personal representative of her husband, by way of a grant of representation to his estate. See *In re Estate of Peter Alusiola Mulamula (Deceased)* [2020] eKLR (Musyoka, J), *In re Estate of Jafeth Birabu Rukokhe* [2020] eKLR (SM Githinji, J) and *In re Estate of Peter Njenga Kinuthia (Deceased)* [2022] eKLR (Achode, J). I have learnt that she obtained orders by way of a citation, to initiate these proceedings, but she has not exhibited a copy of that order. However, it is not a contested point, and so I shall assume that that was so. Even then, the order on citation alone was not adequate. She should have obtained representation to the estate of her husband, before she could move the court in this cause, to administer the estate of her father-in-law, where she has no direct claim or right.

19. A person without prior right, or with a lesser or inferior right, is required, by Rules 7(7) and 26 of the *Probate and Administration Rules*, to obtain the written consents of those with a prior or superior right to apply for representation in their stead, or get those with a prior or superior right to renounce their entitlement to apply and obtain representation, or obtain citations and serve them on the said persons with prior right. The 5 daughters of the deceased, being his children, had a prior right to administer the estate herein, over the 1st respondent, and Rules 7(7) and 26 of the *Probate and Administration Rules* should have been complied with. The 1st respondent should have either obtained their written consents, or their renunciations, or served citations on them. She did neither of these, and, to that extent, she obtained representation to the estate through a flawed process. The 1st respondent apparently complied with respect to only 3 of the sons, the ones he served with citations. She did not comply with respect to the other 4 sons. The *Law of Succession Act* and the *Probate and Administration Rules* envisage a democratic and inclusive process, where all who are entitled are included and involved. Where there is no involvement of a critical constituency, then the process is defective. 9 children were not involved in the process, and only 4 were. The process was, therefore, flawed, and the trial court ought to have taken some remedial action, to sanitise the process. The court did not, instead it ignored the appellants, and approved their exclusion.
20. The same can be said about the confirmation process. Rule 40(8) of the Probate and Administration Rules requires that consents to the proposed distribution be obtained. See *Charles Mutua M'Anyoro vs. Maria Gatiria* [2009] eKLR (Ouko, J) and *Beatrice Mbeere Njiru vs. Alexander Nyaga Njiru* [2022] eKLR (Njuguna, J). No such consents were filed. Rule 40(6) of the *Rules* requires the filing of protests, several were filed, including by the appellants. One of the issues raised was exclusion of the daughters. It meant that, to the extent that the daughters had not signed a consent under Rule 40(8), in Form 37, they had not renounced their entitlement to a share in the estate, for they were not approving the distribution proposed, which was allocating nothing to them out of the estate of their father. It meant that they were not ascertained, and, similarly, their shares in the estate were not, contrary to the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules*. These are issues that the trial court should have considered.
21. This argument was not made before me, but it is inescapable. The exclusion of the 5 daughters of the deceased was discriminatory, based on their gender, ostensibly founded on customary law notions. Article 27 of the *Constitution* outlaws discrimination in all its forms. It decrees that men and women ought to be treated equally, in all spheres of life. Succession is one such sphere. Article 2(4) renders illegal, null and void any act, which is done in contravention of the *Constitution*. The discriminatory acts, in Busia CMCSC No. 27 of 2016, rendered those proceedings invalid, for they contravened Article 27 of the *Constitution*, and fell afoul of Article 2(4) of the *Constitution*. *Wanjiru & 4 others vs. Kimani & 3 others* [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA), where



Articles 2(4) and 27 of the Constitution were applied, to render probate and administration proceedings invalid, on the basis of gender discrimination, is relevant.

22. There is a sense in which this judgment may be seen as against the 1st respondent. I note that the rest of the family is against her, the appellants herein, as well as her co-respondents. However, the 1st respondent did a very salutary thing, in initiating the succession proceedings, in what is now Busia CMCS No. 27 of 2016. The only problem is that she made a few missteps here and there. The deceased died in 1985, and representation to his estate was not sought by his children, who had prior entitlement to administration, over the 1st respondent, for 27 years, until the 1st respondent took the step, in 2012, of having citations issued to them, setting the stage for the process to begin in earnest. The children had gone into deep slumber, and it was the action by the 1st respondent that awoke them. Even these daughters, the appellants herein, who are now complaining, did nothing, yet no one was stopping them, from moving the court appropriately, for the 27 years the estate was in limbo. The 1st respondent showed them the way, they should give her some credit. She cannot, therefore, be the evil that they want to project her to be.
23. Overall, I find that there was sufficient cause, based on what was in the record before the trial court, for that court to revoke the grant that was before it, for the reasons that I have discussed above. The order that should be made, in the circumstances, as I hereby make it, is that the appeal herein has merit. It is allowed, with the consequence that the orders made in the ruling, in Busia CMCS No. 27 of 2016, of 7th October 2022, are hereby set aside, and substituted with an order allowing the application, dated 29th June 2021. Let the trial court appoint new administrators, with input from all the 12 children of the deceased, or their families. The new administrators shall, thereafter, apply for confirmation of their grant, in a process that shall include and involve all the children of the deceased. This being a family matter, each party shall bear their own costs. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 29TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Lucy Mbalanya Omanyoo, 1st respondent, in person.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellants.

Mr. Wekesa, instructed by Makokha Wattanga & Luyali, Advocates for the 2nd and 3rd respondents.**

