



**In re Estate of John Omulwani Amunabi (Deceased) (Succession Cause
503 of 2000) [2024] KEHC 6236 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 503 OF 2000**

PJO OTIENO, J

MAY 24, 2024

BETWEEN

CONSOLATA NYAPELA AMUNABI ADMINISTRATOR

AND

DAVID AMUNABI JOHN APPLICANT

JUDGMENT

1. I am called upon to determine two applications. One is dated 17/8/2020 by a son to the deceased and the other is dated 15/3/2021 initiated by the administratrix.
2. The earlier application seeks in the main for orders that the administratrix be declared as a person of unsound mind; that the Applicant be appointed to act on behalf of the administratrix and that all proceedings taken herein be nullified and set aside. The application is supported by the affidavit of the applicant sworn on the same date in which he avers that since the confirmation of the grant on 11/10/2016, the administratrix has been unable to transfer titles by transmission to beneficiaries due to her mental status and infirmity while the deceased's estate continues to be wasted thus the application. He annexed two medical reports from the Kakamega General Hospital one prepared by Dr. Wakhudu on 26//2017 in which the doctor noted that the administrator had been on a follow up treatment for a recurrent mental problem at the facility since the year 1995 and another by Dr. Mbiti dated 30/7/2020 in which it is noted that the administratrix was a psychotic patient at the facility since 2003 and that she was showing improvement though she still needed psychiatric follow up.
3. The application is resisted by Consolata Nyapela Amunabi the administratrix in her Replied Affidavit sworn on 5/11/2020 where she asserts that the grant that she was issued with in respect to the estate of the deceased was confirmed and that all the parties entitled were allotted their respective shares. She claims that the administration of the estate is complete and all that is left is for the applicant and other beneficiaries that were awarded parcels of land known as Butstso/Shibeye/1462 and 1647 to cause a partition of the same using a surveyor and present transmission documents to her for execution.



4. The second application dated 15/3/2021 was initiated by the administratrix seeking for orders that this court orders the removal of cautions lodged by the respondent on 4/9/2017 against land titles numbers Butotso/Shibeye/5718 and Butotso/Shibeye/5719. The application was supported by the affidavit of Consolata Nyapela Amunabi sworn on the same date. In the Affidavit she averred that she was given land title number Butotso/Shibeye/1695 by dint of a judgment on confirmation dated 11/10/2016 by justice E.C Mwita following which she subdivided the titles into Butotso/Shibeye/5718 and Butotso/Shibeye/5719 but one Mikal Afwande Manyasa then lodged cautions against the new titles on 4/9/2017 claiming beneficial interest. She asserts that the cautions serve no purpose since the summons for revocation of the confirmed grant that gave rise to the sub divided titles was dismissed by this court.
5. The application is opposed by Mikal Afwande Manyasa vide a Replying Affidavit sworn on 1/11/2021 in which she contends that the application is premature since the application dated 17/8/2020 that challenges the succession process is yet to be determined.
6. This court directed that the two doctors who prepared the reports on the mental state of the administrator tender evidence and they testified as below: -
7. Dr. Obindi Mbiti took to the stand and gave a sworn testimony where he stated that he was a medical doctor stationed at the Kakamega General Hospital under the psychiatric department. He stated that on 30/7/2020 he examined the administratrix and that she exhibited poor memory, had pressured speech and that she was hallucinated and so he gave her psychotic drugs. He noted that the administratrix had suffered acute psychosis since 1995 and had maintained a file for her referenced PSY/ GEN VOL 4/350.
8. On cross-examination by Mr. Nyikuti Counsel for the administrator he stated that he prepared the letter dated 30/7/2023 at the request of the Medical Superintendent by the name of Dr. Alusula and he was not aware if he had obtained the patient's consent. He claims that once a report is prepared it is issued to the patient and he is not aware how the same got to court. He declined having ever met the Applicant and further stated that his opinion after seeing the administratrix thrice was that she enjoyed lucid moments.
9. On cross-examination by Dr. Onsango Counsel for the beneficiary he stated that as at 30/7/2020 when he examined the administrator she was not enjoying lucid moments.
10. On being questioned by the court he stated that he prepared the letter on the patient's mental state because the patient requested for it and on that day, she was accompanied by a male relative.
11. Dr. Wakhutu Silas equally took the stand and gave a sworn evidence and stated that he recalled treating a patient by the name of Consolata Nyapela and preparing a letter dated 17/8/2020.
12. On cross-examination by Mr. Nyikuli he stated that he could not remember all his patients and the person who made a request for the report to be made. He further claimed that after making the report he could not remember the person he gave it to. He also stated that it was not acceptable to give a patient's information to third parties without the patient's consent.
13. The Applicant also gave viva voce evidence and stated that the deceased was his father and the administratrix was his step sister. He stated that he was aware that the administratrix has been mentally unwell since the year 1995 and that he was the one that had been taking her to Kakamega County Referral and Teaching Hospital.
14. On cross-examination by Mr. Nyikuli he stated that though not recorded in his Affidavit he was the person taking the administrator to hospital and that he obtained the medical records from her file. He



further stated that they lived with the administrator until the year 2021 when her adult children took her away.

15. On re-examination by Mr. Osango he stated the patient had the medical documents with her whenever he would take her to hospital.
16. After the medical evidence was received, Dr. Osango opted not to file any Submissions while the administrator has put in her submissions on record.
17. It is the submission by the administratrix which does not deny that she is a mental patient, that though the Applicant stated that she had had mental issues since the year 1995, she was appointed in the year 2012 during which period the Applicant never challenged her mental capacity to date. She further argues that the Applicant has not demonstrated how her alleged mental illness had inhibited the administration of the estate.
18. Looking at the applications before the court, the evidence by the doctors, and the submissions by the administrator, the sole issue that arises for court's determination is whether the administrator suffer mental infirmity which disables her from administering the estate. Once that is disposed, the court will determine whether there is need to sustain the caution lodged against the estate property.
19. A brief background of this cause is that the administratrix was issued with a grant on 26/4/2012 for the administration of the estate of the deceased after revocation of the initial grant that was issued in favour of one Joyce Maloba Amunabi. The grant was subsequently confirmed on 11/10/2016 and the court directed that the estate of the deceased be distributed as follows; Butsotso/Shibeye/1462 and Butsotso/Shibeye/1647 which cumulatively measured 22 acres be shared among 8 beneficiaries with each getting 2.1 acres while Butsotso/Shibeye/1695 which measured 0.24 Ha. (0.59 acres) to be given to the administratrix.
20. Notably, since the grant was issued and confirmed, none of the beneficiaries questioned the mental capacity of the administratrix to manage and administer the estate of the deceased until the year 2020 when the application dated 17/8/2020 was filed. The Applicant stated that the administratrix has been mentally unstable since the year 1995 and adduced two medical reports in that regard. How the medical reports were obtained proved to be a tough nut to crack because the doctors summoned acknowledged that medical records can only be given to the patient or to a third party with permission of the patient. Dr. Mbiti appeared to be conflicting himself by stating that he was asked to prepare the subject medical report by the Medical Superintendent and on being questioned by the court he stated that it was the patient who asked him to prepare the report. To this court the medical reports on the administratrix obtained without her permission were unlawfully obtained and not available to be used by the court.
21. When the Applicant took the stand he stated that he was the one responsible for taking the administrator to hospital and that he "took" the medical reports from her file. He suggested that he took same without permission and therefore unlawful. The medical records presented before this court on the mental state of the administratrix appear to have been illegally obtained and the court is guided by the decision of the Supreme Court in the case *Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR where the court on illegally obtained evidence;

"Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person 'unlawfully' or 'improperly' obtains any information held by an entity" Can a court of law admit such evidence...We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely



shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information... Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under *the Constitution* and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.....the Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under *the Constitution* and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us.”

22. Flowing from the above discussion and guided by the decision, the medical reports adduced by the Applicant and the testimonies of the two medical doctors are hereby expunged from these proceedings for failing to meet the test on admissibility. Without the proof of mental infirmity, the application dated 17/8/2020 remains bereft of any merit and is dismissed. No order as to costs.
23. From the time the administratrix was appointed up to the time the grant was confirmed and even with the administratrix subdividing her share of the estate, her mental state was never challenged. For that reason, I will not disturb the proceedings, directions, orders and any activities on the administration of the estate that has been undertaken. To the contrary, it is common ground that everything has been done to enable transmission and the only obstacle is the caution lodged over the property.
22. The court deems the estate substantively administered and what remains may not entirely depend on the administrator to conclude. That shall be achieved by removal of the only impediment, the caution. Let that be removed forthwith and the transmission be effected within ninety (90) days from today.
23. Matter stood over to 17/10/2024 for the administrator to report to court the progress made.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Nyikuli for the Administratrix

No appearance for Osango for the Applicant

Court Assistant: Polycap

