



In re Estate of Machika Ikutwa (Deceased) (Succession Cause 822 'A' of 2014) [2024] KEHC 6204 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 822 'A' OF 2014**

PJO OTIENO, J

MAY 24, 2024

**IN THE MATTER OF THE ESTATE OF MACHIKA IKUTWA
(DECEASED)**

BETWEEN

MICHAEL SHISUBILI KIPLANG'AT PETITIONER

AND

JULIANA MWAYITSI ANYIKA OBJECTOR

JUDGMENT

1. By a Petition of grant of letter of administration filed in court on the 30.9.2014, the Petitioner described himself as the nephew to the deceased.
2. Before the grant could issue, the Objector filed a Notice of Motion dated 12.8.2020 together with a cross petition and an answer to petition. His claim was that her late husband had bought the land from the deceased.
3. In response to Notice of Motion, the Petitioner filed not only Replying Affidavit but also a Notice of withdrawal of the Petition. The effect of the withdrawal was that only the cross petition stood for consideration by the court.
4. In the Replying Affidavit, the Petitioner asserts being a nephew to the deceased then questions the Objector's standing to cross petition for the grant pointing out that there was neither grant of representation to the estate of the husband nor consent of the Land Control Board to grant her standing to seek to administer the estate. The Petitioner denied the allegation that the Objector took possession in 1975 and stated that she only forcefully entered the land in 2014 when with the assistance of the local Chief, who is her in-law, and the area police, she demolished the Petitioner's house as well as the house left behind by the deceased. He reiterated that the Objector was left on the land by the deceased insisting that it was him on the land till he was evicted by the Chief.



5. Subsequently, the Objector filed an Affidavit in Support of Cross Petition for grant of letters of administration intestate. In that Affidavit, the Objector reiterated that the deceased died and left behind no heir, that the Petitioner was not related to the deceased and that she brought the cross petition in the capacity of her husband who bought the land from the deceased, during the deceased's life time, and took possession. She then added that having withdrawn the Petition and having not filed any response to the cross petition, the Petitioner retained no interest in the estate, then prayed that the grant be issued to her.
6. In opposing the application, the Petitioner filed a Replying Affidavit as well as grounds of opposition. In the grounds of opposition, the position taken is that the application for cross petition is incompetent for the reason that the law does not permit a Notice of Motion; that being a purchaser the Objector has no locus standi to lodge a cross petition and lastly that the petition having been withdrawn, the cross petition has been overtaken by events.
7. On the other hand, the position taken in the Replying Affidavit the deceased was survived by a sister, Sulumena, Khatiala Mmbaya, Petitioner's father called David Shisubili and the Petitioner himself. He exhibited an Affidavit sworn by the alleged sister to the deceased which states that the deceased had no family, lived in Thika till 2005 and did not sell his land. The Affidavit also alleges that the estate land was all along taken care of by the Petitioner's father.
8. It is further reiterated that there had not been exhibited a sale agreement or consent of the Land Control Board hence the Objector/Cross Petitioner had not demonstrated entitlement hence the Cross Petitioner was a frivolity and vexation thus abusive of the court process deserving being dismissed so that the sister to the deceased is afforded the opportunity to administer the estate. The grounds were filed on 2.8.2022 while the Replying Affidavit was filed on 7.8.2023.
9. When the matter appeared before the court on 31.5.2022, Mr. Indimuli Advocate, for the Objector, addressed the court and said that there had been no response to the Cross Petition hence urged the grant be issued to his client.
10. To that request Mr. Indimuli was asked if it would not be necessary to file additional papers and he expressed the desire to do so. When the file was in court next, Mr. Mukavale told the court that he had spoken to Mr. Mukabwa for the Petitioner and agreed that the matter be adjourned to enable both sides file additional documents. It is pursuant to that order that the Replying Affidavit by the Petitioner and Affidavit to support Cross Petition were filed.
11. The court has set out the contents of both Affidavits at the beginning of this decision.
12. On the next attendance, both Mr. Mukavale for the Objector and Mr. Mukabwa for the Petitioner. Both Counsel told the court that the only issue for determination was whether it was Mr. Mukavale's client to be appointed the administrator or if it was the person named by the Petitioner as sister to the deceased. With that understanding the court directed that Mr. Mukabwa directs the person alleged to be a sister to the deceased to file an Affidavit establishing her standing with the estate and to attend court on the appointed date.
13. However, on the date appointed, while Mr. Mukabwa was reported sick, there had been no Affidavit filed nor was the alleged sister to the deceased in attendance.
14. The court then appointed the Objector/Cross Petitioner, the Administrator to the deceased's estate and directed that she files an Affidavit of confirmation of grant. The court equally gave leave to any party not happy with the proposed mode of distribution to file a protest within fourteen (14) days after service.



15. On the 21.6.2023 when the matter was called out, both Mr. Mukabwa and Mr. Mukavale were in attendance. Mr. Mukabwa had filed and served the Summons for confirmation of grant, but Mr. Mukabwa, while not disputing service indicated that he had not seen the Summons but sought time to file an application for review and a response to the Summons for Confirmation of grant. The court acceded to the request by Counsel and matter was stood over to the 26.9.2023. By that date, Mr. Mukavale had filed his application for annulment of grant dated 19.7.2023 to which Mr. Mukavale had responded. The court then directed that parties attend court and highlight the filed Submissions but that was not to be because on 6.2.2024, the Counsel for the Petitioner did not attend Court while that who held brief for Mr. Mukavale merely asked for a ruling date.

The Application for Revocation and Annulment of Grant

16. In the application the grounds advanced were that the grant was issued on the basis that it had not been responded to and secondly that the same had been overtaken by events once the Petition was withdrawn.
17. The application was bought by and at the instance of the Petitioner. In it he does not assert an interest in the estate but the fact that he had filed a response to the Cross Petition which had in any even been overtaken by events. He then reiterated the position that there had not been exhibited a sale agreement nor consent to transfer hence the Cross Petition was unfounded as the Cross Petitioner had not demonstrated being a personal representative to her late husband.
18. The application for annulment was opposed by the Administrator/Objector largely on the basis and grounds that she was a widow to a buyer who had taken possession of the estate land and that the Petitioner having withdrawn the Petition left the Cross Petition unchallenged.
19. The Court has given anxious and reiterates position of the law that being an administrator, per se gives to the administrator no better right to share in the estate.
20. The right to inherit and the share to be given is due for ascertainment at the point of confirmation of grant. It is thus the law that not every application for revocation or annulment of grant must result in revocation. In many instances, such may be just but an expression to be given a reasonable provision.
21. In this matter, there being an application for confirmation of grant and it being in the notice of the court that there is an alleged sister to the deceased, the efficacious way to deal with the matter is for such a sister and the Petitioner to file protest to the Summons for Confirmation so that their claims if any is determined once and for all.
22. To that extent and noting that the Petitioner withdrew his Petition more than two years ago, it would be futile to revoke the grant and have the estate without an administrator when the Petitioner himself has never shown an interest to be an Administrator or even a Co-administrator. Even the contentions that the Objector/Administrator is not demonstrated to be the personal representative of the husband who allegedly brought will not assist wind up the estate. The court thus finds and holds that the Application for Revocation lacks merit and the same is thus dismissed.
23. For reasons that the Petitioner and Counsel could have done better it is the obligation to help court discharge its mandate, the costs of the application assessed at Kshs 10,000 are awarded to the Objector/Administrator and made payable within thirty (30) days from today.
24. To move the matter forward, it is directed that any person aggrieved with the proposed distribution in the Summons for Confirmation shall file an Affidavit of protest within thirty (30) days from today.
25. Matter stood over to 24/9/2024 for hearing of the Summons for Confirmation of grant.



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

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Nyikuli for Mukavale for the Petitioner/Respondent

N/A for Mukabwa for the Objector/Applicant

Court Assistant: Polycap

