



REPUBLIC OF KENYA



**In re Estate of Masai Chesititi Kuusani (Deceased) (Succession Cause
179 of 1998) [2022] KEHC 14154 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 179 OF 1998**

SN RIECHI, J

OCTOBER 7, 2022

IN THE MATTER OF THE ESTATE OF MASAI CHESITITI KUUSANI-DECEASED

BETWEEN

HENRY NGEYWA MASAI PETITIONER

AND

JULIUS POI MASAI 1ST RESPONDENT

JACOB WEKESA WAFUKHO & 16 OTHERS 2ND RESPONDENT

JUDGMENT

1. The late Masai Chesititi Kuusani died intestate on 13/8/1977. By consent, grant of letters of administration were jointly granted to Henry Ngeywa Masai, Emmamuel Masai Chesatiti and James O. Masai who then filed their summons for confirmation of grant. The said summons was objected to by the interested parties who filed an affidavit of protest on the grounds that they had bought parcels of land forming the estate. That they already have their title deeds and the petitioners having by consent revoked the grant which gave rise to their titles, their actions are calculated to deny them of their parcels of land. By directions the protest was heard by way of oral evidence.
2. OW-1 Jacob Wekesa Wafula stated that he bought his parcel from one Ronald Nyongesa Masai and Henry the deceased's sons and already has title deed where he stays.
3. In cross examination, he stated that he bought his land on 23/12/1997 before succession proceedings could be undertaken and obtained title in the year 2011 and that he was not in court when the grant was revoked.
4. OW-2 Saleh Simiyu Lukorito stated that he bought his land on 3/4/1992 from Henry Ngeywa and obtained his title deed in 2003 where he stays to date.
5. In cross examination, he reiterated that he has already obtained title deed to his parcel.



6. OW-3 Ramadhan Molanga Ainea stated that he bought his parcel of land from Henry Ngeywa and his brother David Masai in the year 1994.
7. In cross examination, he stated that at the time of such purchase, the proprietor had died though he was provided for as a purchaser.
8. OW-4 George Wakhungu Timotheo stated that he bought his land from Ronald Nyongesa and Henry Masai on 13/11/1996 and he already has the title deed.
9. In cross examination, he stated that he did not know why the grant was revoked.
10. OW-5 David Kiberenge stated that he bought his land in 1994 from Joseph Masai and has since obtained the title deed after the conclusion of the succession process and has been staying thereon. That the nullification of the grant was done without their consent.
11. In cross examination he stated that at the time he bought the land, the proprietor had died and succession proceedings not yet undertaken.
12. PW-1 Henry Ngeywa stated that his deceased father had sold 1 ½ acres of land to Peter Namaswa and signed the agreement before the assistant chief when he had filed the succession cause. That according to him, he has not distributed the deceased estate and was not present when the surveyor carried out the survey works. That his brothers have not been allocated land as per the revoked letters of administration. That he did not know the 55 interested parties who were given land and not aware of the number of title deeds issued after the succession process. He asked the court to revoke the grant so the estate can be distributed afresh.
13. In cross examination, he stated that he signed the succession documents before the chief and surrounded by many people which fact he did not inform court. That he did not obtain the chief's letter prior to filing the succession cause. He did not indicate the mode of distribution or the shares in the summons for confirmation. He did not sell land to Stephen Marani, Christopher or Jacob Wekesa. That he stays on the land with his brothers Peter Masai, Emmanuel and James as well as Mama Rosina and other people. That he has not obtained title to his parcel and only saw the title deeds in court.
14. PW-2 Joseph Tutei Masai stated neither him nor his brothers have been provided for in the earlier grant which was revoked. He had been staying in land parcel number 636 and that his father had sold land to Peter Namaswa. He protested that only buyers were allocated land to the exclusion of the deceased's children. That he did not attend court for the confirmation of grant.
15. In cross examination, he stated that Henry is step-brother. He did not know that the said Henry had filed the succession cause and challenged the letters granted when he got knowledge of the matter. He stated that all the beneficiaries are staying in land parcel no. 636.
16. At the close of hearing, parties were directed to file written submissions. None of the parties complied.
17. According to Form P & A 5 filed in court on 5th September, 2001, Henry Masai, Wilber Mukanda Masai, David Kuchikhi Masai, Peter Cherengi Masai, Nyongesa Masai And Joseph Masai are listed as having surviving the deceased alongside 39 others who are stated to be purchasers.
18. In the summons for confirmation of grant dated 14th May, 2002 Henry Ngeywa listed his brothers alongside those who purchased from each brother. None of his brothers was allocated any share other than himself where he allocated himself two portions measuring 0.75 ha and 0.13 respectively. The grant was confirmed on 16th July, 2002 and a certificate of confirmation issued in the terms



19. After confirmation, his brothers successfully revoked the letters on the ground that they had not been involved in the entire process thus fresh letters were issued incorporating his brothers and directed to file summons for confirmation. It is at this point that the interested parties also approached court objecting to the revocation citing the reason that they have already obtained title deeds and are in occupation of their respective portions. Title deeds were exhibited in court.
20. There is ample evidence that the deceased's children sold land to third parties as confirmed by the sale agreements exhibited in court. An outstanding feature in the agreements is that all the deceased's sons sold out their portions of land. The assertion by Henry that he did not sell any land to anybody is not true. In particular, he denied selling to Christopher, Stephen and Jacob which fact is not true because there are sale agreements executed by him in favour of the purchasers. He did not mention that the signature appearing thereon were forged.
21. The said Henry also disputed engaging the surveyors for the survey work. The court has perused the mutation form registered on 7/2/2002. The same has his thumbprint. The witness did not dispute the authenticity of the thumb impression. Both parties admit that their late father sold to one Peter Namaswa.
22. It is also not in doubt that the deceased died in the year 1977 while all the agreements exhibited show that they were entered into long after the deceased's death and before the grant could be confirmed on 16th July, 2002. This would mean that the purchasers did not deal with the deceased save for Peter Namaswa and their actions constitute intermeddling with the estate as provided for under section 45 of cap 160 which provides;
 - (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
23. A similar scenario played out in *In re Estate of Barasa Kanenje Manya (Deceased)* (2020) eKLR where Musyoka J held;

By dint of section 45 of the *Law of Succession Act*, any transaction between the deceased's son and any other person amounted to intermeddling with the estate of the deceased, and those involved, therefore, would be deemed to have engaged in criminal activity and should have been prosecuted. The sales contravened sections 45 and 82 of the *Law of Succession Act* and there was no possibility that the applicants could have acquired any valid title from the sales, for the person who purported to sell the property to them had no title to it. He had nothing to sell and the applicants bought nothing from him.
24. From the findings in the above, Henry is untruthful in distancing himself from the entire process of taking out letters of administration all the way up to sub-division of the land into several parcels now occupied by the interested parties which fact he confirmed in evidence that there are other people



- occupying the land. Evidence tendered puts him at the centre of the entire transaction which this court finds to be substantial in the circumstances. The objectors cannot also distance themselves from the entire process. The fact that survey was done does not mean that the objectors had no knowledge of such a process going on.
25. The court finds that even at the time the objectors filed their summons for revocation, they knew or ought to have known that titles have been issued in the purchaser's names and occupied by the various buyers.
 26. The issue herein is whether given the above, the court is entitled to reinstate the revoked certificate of confirmation of grant taking into account the fact the same was revoked by consent. The allegation that the deceased's beneficiaries were dis-inherited in favour of purchasers, or in the alternative whether the court can revoke the titles so obtained and revert the estate back to the estate for proper distribution.
 27. Having considered the certificate of confirmation as well as the summons for confirmation and P & A 5, the petitioner was consistent that there are purchasers who are entitled to the estate which fact only changed after the brothers moved court for revocation of grant. The totality of the evidence is that the deceased's sons indeed sold their parcels and now want to go back on their word and dispossess the purchasers.
 28. In the above stated authority, the court went on to find that the remedy of a buyer who buys from the estate before the grant could be confirmed had a remedy in pursuing the seller for a refund of the purchase price. Such would be ideal situation here but for the petitioner's subsequent acts including processing the titles in the names of the purchasers and the same surrendered.
 29. It is stated under Sections 79, 82 and 83 of cap 160, the administrator is properly vested with the powers to deal with the estate upon confirmation of the grant and not earlier than that. In the instant case, the grant having been confirmed on 16th July, 2002, Henry was then seized of the power to transmit the estate as he did. The actions done before the confirmation were consequently validated. In any case, the application for revocation of grant has been overtaken by events in that title deeds have already been issued. I also find that the purported revocation of the confirmed grant was aimed at dispossessing the purchasers who had obtained their shares with the assistance of the petitioners in a proper process of succession where the respondents were involved.
 30. Having found as such, the court finds and holds that the application lacks in merit and is hereby dismissed. Consequently, the certificate of confirmation of grant issued on 16th July, 2002 and revoked by consent on 10/7/2008 is hereby reinstated. Each party to bear his costs.

DATED AT BUNGOMA THIS 7TH DAY OF OCTOBER, 2022.

S.N. RIECHI

JUDGE

