



REPUBLIC OF KENYA



**Murutu v Muchenje (Succession Cause 211 of 1997)  
[2024] KEHC 10391 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10391 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 211 OF 1997**

**DK KEMEL, J**

**AUGUST 23, 2024**

**BETWEEN**

**SAMWEL MULONGO MURUTU ..... PETITIONER**

**AND**

**KENNETH WEKESA MUCHENJE ..... OBJECTOR**

**JUDGMENT**

1. Vide Chamber Summons dated 20<sup>th</sup> September 2002 and filed in Court on 2<sup>nd</sup> October 2002, the Petitioner herein prayed for orders that: The grant of letters of administration made to Samwel Mulongo Nato on 12<sup>th</sup> February 2002 be confirmed and that the costs of the application be in the cause.
2. Opposing the application, the Objector herein filed a replying affidavit dated 11<sup>th</sup> December 2002 and filed in Court on 20<sup>th</sup> December 2002 averring that the application for confirmation of grant dated 20<sup>th</sup> September 2002 should not be granted as the same failed to disclose all the names and shares of the beneficiaries. He told the Court that he is the son of the late Patrick Wekesa Nato, who was a brother to the deceased herein and as per the direction of family and Kimilili Dispute Tribunal his late father was entitled to 3 acres from the land parcel Kimilili/Sikhendu/589 that belonged to the late Nato Musamia, his grandfather.
3. On 7<sup>th</sup> March 2003, the Petitioner herein swore a supplementary affidavit denying the claims as contained in the Objector's replying affidavit
4. The application was dispensed with by way of viva voce evidence.
5. PET.PW1 was Samwel Mulongo Murutu who testifies that he is the son of the deceased herein and that the deceased was survived by 11 children but 8 are alive. He told the Court that the deceased left an asset namely land parcel LR. No. Kimilili/Sikhendu/589 measuring 8 acres. According to him, the father of the Objector resided in Uganda and when he returned on 15<sup>th</sup> October 1975 he agreed to leave the land in dispute to him and his siblings after receiving 2 heads of cattle. He produced in Court



an agreement to that effect as PET-Exhibit 1 (b). He added that the Objector's father laid no claim to the land even after the death of the deceased herein.

On cross-examination, he told the Court that his father passed away in 1972 and that the agreement was entered four years after the death of his father but it was his brother who signed the same.

6. PET-PW2 was Tecla Naliaka who testifies that the Objector's father was her brother-in-law. According to her, the Objector's father told her that the deceased herein promised him two cows which she gave to him and an agreement was drafted to that effect. She told the Court that she signed the same through a thumb print as per PET-Exhibit 1(a) and that the Objector's father never lodged any claim over the suit land.

On cross-examination, she told the Court that she was not aware if the deceased herein inherited land from his father but she is certain that he had two sons. She told the Court that the Objector's father was still young by the time she was married to the deceased herein and that the deceased and the Objector's father agreed that the Objector's father will move out of the land. She told the Court that the Objector's father filed a claim at the Land Disputes Tribunal but is not aware of the outcome.

On re-examination, she told the Court that when an agreement was entered with the Objector's father, the Objector's father moved out on his own volition.

7. PET-PW3 was Henry Mururtu who testifies that Objector's father was his uncle and that the deceased herein is his father who passed away while he was 17 years. According to him, the Objector's father was given two cows from the dowry of his sister to surrender his share in land parcel LR. No. Kimilili/Sikhendu/589 and that he told them that he agreed with the deceased that he would vacate the land. The same was reduced into a handwritten agreement dated 15<sup>th</sup> October 1975 and that he was present. He told the Court that the Objector's father later sued them at the Land Disputes Tribunal and that land parcel LR. No. Kimilili/Sikhendu/589 had not been shared out between the deceased and the Objector's father.

On cross-examination, he told the Court that he did not disclose to the Land Dispute Tribunal that the Objector's father sold his share to them and that he moved out after he was given two cows. The tribunal gave him 3 acres and that he appealed the decision. He told the Court that he presented the agreement before the tribunal but they rejected the same.

On re-examination, he told the Court that the Objector's father filed claim before the tribunal prior to the making to the agreement.

8. PET-PW4 was Gabriel Wamalwa Murutu who testified that the Petitioner herein is his brother and that the Objector's father is his uncle. Referring to Petitioner Exhibits 1(a) and (b) which was made in the presence of the Objector's father, Tecla Naliaka, Henry Murutu and Makinya, the Objector was given two cows in exchange for his shares. He told the Court that the Objector's father never lodged any claim within three days as required under Bukusu Customary Laws (lufu ceremony). He insisted that the Objector's father has no claim on land parcel LR. No. Kimilili/Sikhendu/589.

On cross-examination, he told the Court that the Objector's father was give two heads of cattle for his share in land parcel LR. No. Kimilili/Sikhendu/589 and that he does not know when his father purchased the land and whether the Bwatiwo clan deliberated on the same.

9. By consent dated 18<sup>th</sup> July 2023, Andrew Mukhebi Wekesa, was allowed to substitute the deceased Patrick Nato as the new Objector. Vide Court directions dated 15<sup>th</sup> November 2023, this Court proceeded to set down the hearing of the Objector's case with or without witnesses.



10. OB-PW1 was Kennedy Wekesa Muchenje who testified that he is the son of the deceased Objector, Patrick Nato. He relied on his statement dated 7th December 2023. He stated that the land in question belonged to their grandfather. According to him, the agreement PET-EXH 1(a) has three witnesses while the translated version PET-EXH (b) has five witnesses. He insisted that his late father, Patrick Nato, did not sign any agreement and that it was only Tecla and Wamalwa who did so.

On cross-examination, he told the Court that his father never signed any agreement and that he does not agree with the petitioner's exhibit PET-EXH 1(a) and (b). He noted that his father died in 2007 and that the sale agreement was entered into in 2005 when his father was still alive. He told the Court that his father's remains were buried in a parcel which he purchased and that he never subjected the sale agreement to forensic analysis.

On re-examination, he told the Court that he has seen the sale agreement but insists that his father never signed the same. He reiterated that his father had proposed six acres to go to the deceased herein while he be given three acres.

11. At the close of the Objector's case, this Court directed parties to file and exchange their respective written submissions. Both parties complied.
12. It is imperative to note that the Objector was to approach this Court vide an affidavit of Protest. In the case of *Phillip Chemwolo & Another – Vs- Augustine Kubende* it was held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits...The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”

13. *The Constitution* under Article 159 states that justice shall be administered without undue regard to technicalities.
14. The same was emphasized in *James Marvell Musoo v. Ezetec Limited* Cause Number 1263 of 2012 where the Court allowed the Applicant to file his application.
15. I have considered the evidence of the parties herein and the submissions. The issue for determination here is whether the proposed distribution of the estate of the deceased by the Petitioner should be upheld.
16. The burden of proof in a suit or proceeding, lies on that person, who will fail if no evidence at all were given on either side. See also Section 107 of the *Evidence Act*. The Petitioner herein availed evidence in form of a sale agreement duly executed by the Objector's late father, Patrick Nato, and witnessed as PET-EXH 1 (a) and (b). This simply means that the Objector's father signed away his rights to the land parcel LR. No. Kimilili/Sikhendu/589 in exchange for two heads of cattle. The Objector insisted that his father never signed the sale agreement but he never availed evidence to dispute the fact that it was not his signature affixed on the sale agreement. It is clear this is a case of greed on the part of the Objector and his family. From the evidence on record, there exists a valid sale agreement which was properly executed by the parties and despite the Objector's rejection of the same with no substantial evidence availed to proof forgery on the part of the signature of his late father on the transaction, he chose to turn around and insist that that was not his late father's signature, which are mere aspersions on the integrity of the Petitioner and his family. Further, there is no evidence that he had ever lodged a complaint with the police over his father's signature if the same was forged since he insists that it was not made by his late father. It is instructive that the Objector did not avail witnesses to support his case



and which leaves no doubt that the version of events as narrated by the Petitioner must be believed as the truth and backed by documentary evidence.

17. There was therefore no proof to the required standards. That proof was to come from the Objector. Justice Mativo (as he was then) in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, observed as follows in similar circumstances:

“It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the Appellant made allegation in the plaint, hence she was under an obligation to support the allegation. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of Kshs.316,000/- was arrived at.”

18. There was no reliable evidence from the Objector to prove with the necessary degree of certainty required that the Petitioner and his family forged his late father’s signature and that he was not involved in the sale agreement where he was given two head of cattle in exchange for his share on land parcel LR. No. Kimilili/Sikhendu/589.
19. Since the burden of proving the same was on him, this Court is justified in finding that the threshold to stop the confirmation of grant of letters of administration was not duly met by the Objector. The application herein was thus filed in bad taste by the Objector to try his luck.
20. In view of the foregoing observations, it is my finding that the Objector’s application in protest to the Summons for Confirmation dated 20<sup>th</sup> September 2002 lacks merit. The same is dismissed with no order as to costs. The Petitioner’s application for confirmation of grant dated 20.9.2002 is allowed as prayed. The grant issued to the Petitioner on 12<sup>th</sup> February, 2002 is hereby confirmed and that the estate shall be distributed as proposed vide paragraph 5 of the Petitioner’s supplementary affidavit sworn on 7.3.2003.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.**

**D. KEMEI**

**JUDGE**

In the presence of :

No appearance Wamalwa Simiyu for Objector

Sabwami for Onyando for Petitioner

Kizito Court Assistant

