



Case Number:	Succession Cause 505 of 2011
Date Delivered:	22 Mar 2022
Case Class:	Civil
Court:	High Court at Kakamega
Case Action:	Ruling
Judge:	Farah S.M Amin
Citation:	In re Estate of Peter Wandanje Omachi (Deceased) [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	Kakamega
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application ordered
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 505 of 2011**

**IN THE MATTER OF THE ESTATE OF PETER WANDANJE OMACHI (DECEASED)**

**BETWEEN:**

**BEATRICE**

**ANDANJE.....PETITIONER/RESPONDENT**

**AND**

**ANTHONY**

**NYONGESA.....OBJECTOR/APPLICANT**

**RULING**

1. The Court has before it an Application for revocation and/or annulment of Grant (*Under Section 76 and Rule 44 of the Probate and Administration Rules*). The Applicant/Objector seeks the following Orders:

“1. **THAT** the Applicant be enjoined and or included in the succession cause herein as one of the beneficiaries to the estate of the deceased herein.

2. **THAT** the court be pleased to include land parcel L.R. S. WANGA/BUCHIFI/590 in the list of assets of the deceased herein.

3. **THAT** upon prayers 1 and 3 above being granted the succession cause herein be fixed for confirmation.

2. The Application is supported by the annexed affidavit of Anthony Nyongesa, the Objector. He puts forward the following general grounds:

“a. **THAT** the succession cause herein was filed by the instigation of the Objector/Applicant herein who cited the Petitioner/Respondent herein.

b. **THAT** after filing the succession cause herein the Petitioner deliberately omitted to include the Objector/Applicant as one of the beneficiaries to the estate of the deceased herein.

c. **THAT** the Petitioner/Respondent equally omitted to include land parcel L.R. S. WANGA/BUCHIFI/590 as one of the properties registered in the names of the deceased herein.

d. **THAT** the Objector/Applicant who is the administrator of the estate of AMBATSA WESA is entitled to the whole of the said land parcel L.R. S. WANGA/BUCHIFI/590

e. **THAT** the deceased herein illegally and fraudulently some time in 1975 and after the death of the first registered proprietor WAMBATSA WESA illegally acquired the said land L.R. S. WANGA/BUCHIFI/590 purporting to be a close relative of the said WAMBATSA WESA when he was not.

f. THAT the Objector/Applicant is in occupation and use of the said land parcel **L.R. S. WANGA/BUCHIFI/590** currently registered in the names of the deceased herein **PETER WANDANJE OMACHI**.

g. THAT the Applicant is entitled to land parcel **L.R. S. WANGA/BUCHIFI/590** registered in the names of the deceased herein by transmission.

h. THAT the grant was obtained fraudulently by making a false statement

i. THAT the grant was obtained fraudulently by concealment of material facts.

3. In his Supporting Affidavit the Objector/Applicant explains that he cited the Petitioner and her two co-wives (widows) because the land in dispute, land parcel L.R. S. WANGA/BUCHIFI/590 (hereinafter referred to as “the disputed land”, was illegally and fraudulently registered in the names of the deceased PETER WANDANJE OMACHI (“hereinafter referred to as the Deceased herein”). He sets out a long history of litigation between his late Father and/or Grandfather and the Deceased whereby it was resolved that the disputed land was beneficially owned by Wambatsa Wesa but had become registered in the names of the Deceased notwithstanding that the first registration had been in the name of Wambatsa Wesa. As a consequence the adjudication was that the Deceased herein held the disputed land on trust for Wambatsa Wesa. Wambatsa Wesa passed away on and the Objector became the Administrator of his Estate.

4. The Objector states categorically in his Affidavit that the Deceased herein sometime in 1975 illegally and fraudulently by transmission got himself registered as the proprietor of the disputed land. The history of the litigation traces itself through:

(a) **Kakamega SRM’s Court Civil Case No. 638 of 1997**

(b) **Mumias Land Disputes Tribunal Case No. 21 of 2001**

(c) **Kakamega CM’s Court Miscellaneous Award No 38 of 2002** which adopted the decision of the Mumias Lands Tribunal

(d) **Western Province Appeals Committee Appeal No 97 of 2002** which did not include the Objector nor his Mother MELANIA NYONGESA, which resulted in their eviction.

(e) **High Court, Kakamega Civil Appeal No. 57 of 2009** which reversed the decision of the Western Province Appeals Committee.

5. The Objector informs the Court that there was no familial relationship between the Deceased herein and the Objector or his late grandfather (Wambatsa Wesa). He explains that the Deceased herein is from the Abashubungu clan whereas the Objector’s family belong to the Bakalibo Clan. He asserts that the land in question is ancestral land.

6. In relation to the conduct of the Petitioner herein, the Objector tells the Court that she is fully aware of his claim and the basis for that. He says that the Deceased passed away on 9<sup>th</sup> June 2009. He says that he filed a Citation against all three widows of the Deceased herein in his Citation asserts that as a consequence the Petitioner is fully aware of his claim. The Objector/Applicant explains that he cited the Petitioner and her two co-wives (widows). He complains that as a consequence of the then ongoing litigation the land in dispute, land parcel L.R. S. WANGA/BUCHIFI/590 was illegally and fraudulently registered in the names of the deceased PETER WANDANJE OMACHI as shown on the Official Search marked AN-1. He says that it is inconceivable that the Deceased could have inherited his ancestral land. He did so on the “pretext” that he was a close relative. The Objector also states that the Deceased falsified documents which he used to register himself as the proprietor of the disputed land. He explains further that although his Grandfather’s land and the Deceased’s own land were in the same area, they were separated by a stream.

7. The Objector then goes on to say that after the Deceased had illegally obtained registration of the disputed land, he proceeded to harass the family of the objector. In 1980 he instituted criminal proceedings (for forceful detainer) against the Late Alfred Nyongesa, father of the Objector. The matter went to full trial at **Mumias District Magistrates Court Criminal Case No. 17 of 1980**. Alfred Nyongesa was acquitted and the Court established that it was the Deceased who was in the wrong, it is said. The Deceased then began a civil case against Alfred Nyongesa in **Kakamega Resident Magistrates Court Civil Case No. 291 of 1980**.

8. The Objector says that after the death of Alfred Nyongesa, the Deceased then moved onto suing his wife Melenia Nyongesa and Son, the Objector, in particular in *Kakamega Resident Magistrates' Court Civil Case No. 638 of 1997*. That file was referred to Mumias Land Disputes Tribunal and became *Case No 21 of 2001*. The litigation went on for a significant number of years. Eventually the Appeal filed in the High Court was transferred to the newly established *Environment and Land Court as Appeal No. 22 of 2017*. On 17<sup>th</sup> May 2018 the Court gave judgment in favour of the Objector. A copy of the Ruling appears as "AN-22".

9. It is of concern where the Objector says that following the death of the Deceased, his three widows Shikuku Wandanje, Beatrice Wandanje (the Petitioner) and Josephine Wandanje entered the land in dispute and arranged for their workers to cut down mature trees. That led to an altercation and they reported the matter to the Police who then arrested the Objector and his two brothers Emmanuel Shiundu Nyongesa and John Lubale Nyongesa resulting in a *Criminal Case No. 509 of 2010* in Mumias Resident Magistrate's Court. The Criminal Case was quashed by the High Court Judge on 4<sup>th</sup> December 2013. It is also noted that within *Civil Appeal No. 57* the Petitioner substituted the Deceased from 27<sup>th</sup> March 2012. From AN-22 the Judgment of the ELC, it is notable that the Court stated that "the Appellant (the Objector) told the Court how he got the land and how the Respondent encroached by first holding himself out to be a close relative of the Appellants. The Respondent (the Deceased) had brought a claim for trespass to his land. The Court heard evidence and came to the conclusion that; "The fact that from the testimony of the said PETER WANDANJE OMACHI it is difficult to know how much land he allegedly bought i.e. whether it is 4.0 hectares or 10.5 acres shows that PETER WANDANJE OMACHI is a true liar.". The Court then went on to *quash the decision/verdict of the Mumias Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee with nor order as to costs.*"

10. The Objector feels that after the Environment and Land Court upheld the decision of the Mumias Land Disputes Tribunal, the only way he can legally acquire title to the disputed land is through the succession cause. He would like the disputed land to be included in the Schedule of Assets and for him to be named the beneficiary to whom that land is then distributed.

11. The Petitioner has filed a Replying Affidavit. At paragraph 8 onwards she says;

"8. **THAT** the deceased bought the said parcel of land which measures approximately 10 acres from Nasiche Atiti Ambatsa in 1974 and the process of sale was done legally and as per the procedures laid down in the then land laws.

9. **THAT** the said sale was witnessed by 7 witnesses namely:-

- (a) Namukuru Ebalala - Deceased
- (b) Francis Angulu - Deceased
- (c) Peter Nanzala - Deceased
- (d) Ashika Mola - Deceased
- (e) Michael Makokha - Deceased
- (f) John Ongalo - Deceased
- (g) Benedict Kwaha - Living

10. **THAT** the Objector herein is not related to the deceased herein thus not a beneficiary of his estate.

11. **THAT** the Objector is a stranger to the estate of the deceased.

12. **THAT** the proceedings to obtain grant in this instant suit were proper and in accordance with law of succession Act.

13. **THAT** I am advised by my advocates on record which advice I verily believe to be true that this Honourable Court lacks the requisite jurisdiction to determine a claim as to the ownership of land as the same falls within the jurisdiction of the Land and Environment Court."

12. Apart from the yet further version of how the Deceased came to have the land, the Petitioner does not address the issues raised by the Objector at all. Further, the Petitioner now says the Court, within the same succession file she instituted as a petitioner lack jurisdiction to resolve who are the true beneficiaries of the Estate and what are the assets that comprise the Estate. That is a sad state of affairs.

13. The Objector has filed extensive written submissions which the Court has considered carefully. They are very helpful but are not set out verbatim in the interests of brevity. From the foregoing, it is clear that the issues before the court are firstly what property is comprised in the Estate of the Deceased. Secondly it is, who are the beneficiaries entitled to that property. That creates the impression that the Petitioner is untrustworthy and therefore unfit to act as an administrator of the Estate.

14. The Petitioner herself has stated in her Replying Affidavit that the land in dispute namely L.R. No. S. Wanga/Buchifi/590 is registered in the name of the Deceased. She fails thereafter to explain why she did not include it in the Petition or the Schedule of Assets listed in the summons for confirmation of grant. From that it is clear she was not being completely straightforward and candid. The Objector is asking the Court to revoke the grant and then at the same time name him as a beneficiary entitled to the whole of the disputed land. Although, the thrust of the Objector's position is understandable, his prayers are misconceived. Without a grant there can be no confirmation.

15. The Court heard oral evidence from the Parties and their witnesses each asserted their version of events. This Court is not deciding ownership but succession. The issue of legal ownership has been resolved by the Environment and Land Court in 2017. What the Objector contends for is beneficial ownership. In that regard this Court is satisfied that earlier proceedings have established that the land forms part of the ancestral land of NASHICHE ATITI AMBATSA, AMBATSA WESA and ALFRED NYONGESA MOLA OLUCHIMBA and their descendants. Any beneficial ownership to the Deceased has not been conclusively established.

16. Further, this Court is not satisfied that the Objector is the sole beneficiary of Alfred Nyongesa Mola Oluchimba. From his own evidence it is clear that there is also a widow and siblings who can claim shares. In the circumstances, the prayer for the full 10 acres or so to vest in the Objector is dismissed.

17. In the circumstances, it is ordered and directed that:

(1) The Petitioner/Administrator/Respondent BEATRICE WANDANJE ANYANGU is discharged as an Administrator, she is not a proper person to act as administrator.

(2) The Public Trustee be and is hereby appointed as the sole administrator of this Estate

(3) The Hon Deputy Registrar to notify the Public Trustee of this Appointment in writing together with a copy of this Order, without delay.

(4) The disputed land **L.R. No. S. WANGA/BUCHIFI/590** formerly owned by Nische Atiti Ambatsa shall be included in the schedule of assets as it is registered in the name of the Deceased.

(5) The Public Trustee is directed to make the necessary inquiries and ascertain which or the parties to the dispute are the correct parties to the land in dispute.

(6) Thereafter the Public Trustee shall file summons for confirmation of grant

(7) The succession files for the Estates of NASHICHE ATITI AMBATSA, AMBATSA WESA and ALFRED NYONGESA MOLA OLUCHIMBA be called for from the Mumias SPM's Court and placed with this file for further consideration.

(8) Costs Reserved.

It is so ordered.

**FARAH S. AMIN**

**JUDGE**

**DELIVERED DATED AND SIGNED IN KAKAMEGA ONLINE USING MS-TEAMS ON 22ND DAY OF MARCH 2022**



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