



In re Estate of Luxious Ongaro Owaka (Deceased) (Succession Cause 6 of 1998) [2024] KEHC 9421 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 6 OF 1998
HM NYAGA, J
JULY 31, 2024**

IN THE MATTER OF THE ESTATE OF LUXIOUS ONGARO OWAKO (DECEASED)

BETWEEN

EMMACULATE WAKA ONGARO OBJECTOR

AND

MARY AKUMU ONGARO 1ST RESPONDENT

JACOB OTIENO ONGARO 2ND RESPONDENT

JAMES OPIYO ONGARO 3RD RESPONDENT

GEORGE ODONGO ONGARO 4TH RESPONDENT

ELIZABETH MAGERO 5TH RESPONDENT

EDWIN ODHIAMBO 6TH RESPONDENT

PASCAL WAKA ONGARO 7TH RESPONDENT

RULING

1. This Succession Cause relates to the estate of Luxious Ongaro Owaka (hereinafter ‘the Deceased’) who passed away intestate on the 7th December, 1997.
2. Following the death of the Deceased his widow Mary Akumu Ongaro, (hereinafter ‘the Administratrix’) applied for letters of Administration Intestate in respect of the estate of the Deceased. The Grant of letters of Administration was issued to her on 12th March, 1998.
3. On 10th July,2023, the Administratrix filed summons for confirmation of grant dated 4th July,2023. Before the same could be heard, the objector, Emmaculate Waka Ongaro who is the deceased’s daughter, filed an objection to the making of grant on 31st August,2023. The Objection is premised



on grounds that the proposed mode of distribution is discriminatory as it has left out some of the beneficiaries including her and that the signature purporting to be hers was forged by the administratrix in an effort to deceive this Honourable Court.

4. The objection is supported by his affidavit sworn on the even date wherein she reiterated the above grounds. Additionally, she averred that her claim is for the estate to be distributed equally among all the beneficiaries, and that L. R No. Nakuru Municipality Block 3/1020 is where she lives but his brother Pascal Rabolla Ogaro wants to unlawfully evict her.
5. The Objections was heard through *viva voce* evidence.

Objector's Case

6. The Objector testified that she was not involved in the alleged family meeting and there was no grant to authorise the purported sale. She stated that the signature in the consent is not hers and that she was not given a share from the purported sale.
7. On cross examination, she told court that the proposed distribution is unfair as some of the beneficiaries have not been provided for. She stated that her sister faith died and her mother is taking care of her children. It was her testimony that she refused to sign the consent and the signature in the consent is a forgery. She said she lives in the property at Shabbab and she placed a caution on it. She is not opposed to the subject land being sold save that she prayed that she be given her share.

Respondents' Case

8. The 1st Respondent, Mary Akumu Ogaro adopted her written statement. In that statement she stated that after the death of the deceased she filed this cause and listed the following as the assets of the deceased;
 - i. Land Parcel No. Nakuru Municipality Block 3/1020
 - ii. Benefits from Kenya Posts & Telecommunications Corporation (KP & TC)
 - iii. National Bank of Kenya Limited A/C No. 30107468, Nakuru.
 - iv. Motor Vehicle Registration No. KPB 667
 - v. Plot in Magusu Market, Bondo Division, Homa Bay.
 - vi. Ancestral Land in Homa Bay, measuring about five (5) acres.
 - vii. Kenya Finance Bank Limited (in receivership) A/c No. 021-463
9. She stated that soon after instituting this cause, she discovered that the Deceased never owned the Plot in Magusu Market, Bondo Division, Homa Bay but was owned by his brother Stanislaus Angwel and that the ancestral land in Homa Bay was disposed off by the deceased's brother as soon as he died.
10. She stated that over the years, being the sole bread winner of the beneficiaries herein and children of her deceased daughter Faith Akinyi Ongaro, coupled with the fact that she was unemployed, she used the meagre benefits from Kenya Posts & Telecommunications Corporations, Monies in the aforementioned account in National Bank of Kenya and Kenya Finance Bank Limited for living expenses, beneficiaries' school fees and developing land parcel No. Nakuru Municipality Block 3/1020. That in the process, all the beneficiaries including the objector directly benefitted from the said assets.
11. She asserted that the only remaining property is land parcel No. Nakuru Municipality Block 3/1020 (Nakuru Property) where she, the deceased, and their children lived.



12. She stated that at the time of the deceased's demise this property was developed with a three bedroomed house but subsequently with the use of the resources from KP & TC, National Bank and Kenya Finance Bank and proceeds from sale of Motor Vehicle Registration No. KPB 667, they developed the Nakuru Property with a two bedroomed house, a bedsitter and a double room.
13. She stated that today, the three bedroom and two bedroom houses on the land have been rented out to the objector and one of the beneficiary Edwin Odhimbo who live in a double room and a bedsitter respectively.
14. She stated that as a family they agreed that she should relocate to Bondo Ny'angoma area where earlier on her sons, Pascal Waka Ongaro and Jacob Otieno Ongaro had purchased a parcel of land and developed it with a living house. That in these discussion, they further agreed to sell the Nakuru Property and use the proceeds to renovate the living house on the Bondo Ny'angoma land that was in bad shape and also build rentals thereon.
15. She stated that sequentially, they actively attempted to get purchasers for the Nakuru Property but unfortunately they were unable to get one, that out of purely good will and in a bid to see them actualize their dream, her son Pascal Waka Ongaro offered to purchase the Nakuru property at Ksh. 6.5 Million. She said the family discussed Pascal's offer including the objector and they agreed to it.
16. Consequently, Pascal Waka Ongaro paid the purchase price as agreed and as per the family agreement they used the money to renovate the living house in Bondo and rental units thereon.
17. She stated that presently she lives in Bondo Property with her grandchildren and with her daughter Elizabeth Magero.
18. She asserted that the objector has always been part and parcel of the aforesated family affairs/ discussions and she was surprised when she instituted the present objection. She thus believes that the said objection is an afterthought, frivolous, lacks merit, an abuse of the court process and tailored to mislead the court and is only meant to split the hairs among family members.
19. On cross examination, she stated that the objector lives on the Nakuru Property. She said she used the proceeds to develop the land in Bondo in which the objector is entitled to a share.
20. After the above respondent testified, the counsel made an application to adopt the witness statements of other witnesses but there is no order on record allowing the same.
21. The parties thereafter filed their respective submissions.

Applicant's/Objector's Submissions

22. The Objector submitted that the proposed distribution is unfair and done in contravention of the law. She reiterated that her consent was obtained fraudulently through forgery of her signature. It was her submissions that she has not been provided for in the summons for confirmation of grant despite being a beneficiary of the deceased.

Respondents' Submissions

23. The respondents submitted that the objector never contested the fact that she among other beneficiaries have already benefitted from Estates in Kenya Posts & Telecommunications Corporation (KP & TC), monies in the National Bank of Kenya Limited A/C No. 30107468, Nakuru, Kenya Finance Bank Limited (in receivership) A/c No. 021-463 and Motor Vehicle Registration No. KPB 667, and that at present the only remaining asset of the deceased's estate is the Nakuru Property.



24. The Respondents posited that the objector's assertions are false because;
 1. She resides in the Nakuru Property amongst other tenants, including the beneficiary Edwin Odhiambo and therefore it is highly unlikely that she was unaware of the sale of the property where various prospective purchasers were visiting the Nakuru Property.
 2. The family agreed on selling the Nakuru Property to beneficiary Pascal Waka Ongaro and he paid Ksh. 6.5 Million over a period of 3 years and equally it is highly unlikely that over the said period of 3 years, the objector was totally unaware of the family's decision to sell the Nakuru Property and the fact that beneficiary Pascal was purchasing the property.
 3. The Objector appended her signature in the Summons for confirmation in affirmation of allocation of the Nakuru Property to beneficiary Pascal Waka Ongaro and her assertion that her signature was forged is unproved.
25. The Respondents argued that Pascal having paid the entire purchase price he is entitled to the Nakuru Property and the Objector's repudiation thereof is not permissible in Law.
26. The Respondents submitted that courts are enjoined to dispense substantive justice as opposed to technical justice and to uphold the conscience of the whole humanity and not to allow its processes to be used to perpetuate dishonesty and fraud. To buttress this position, reliance was placed on the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* [2014] eKLR.
27. The Respondents argued that the Objector is barred by the doctrine of estoppel from renegeing on the sale, ostensibly because at the time of the sale the grant had not been confirmed.
28. The Respondents Citing the cases of *in Re Estate of Mary Chesiroyebei (deceased)* [2019] eKLR & *Musa Nyaribari Gekone & 2 others vs Peter Mijienda & another* [2015] eKLR argued that Succession courts in their post 2010 decisions have allowed Applications for revocation of grants wherein purchasers' beneficial interests had been concealed and/or ignored while applying for grant.
29. They posited that they were right in acknowledging beneficiary Pascal Waka Ongaro interests in the Summons/ Application for confirmation of Grant dated 4th July,2023.
30. In the end, the Respondents urged this court to dismiss the objection and allow the summons for confirmation of grant as prayed.

Analysis & Determination

31. The issues that stand out for determination are: -
 1. Whether the Objector's objection is merited.
 2. What orders should this court issue?
32. From the material before me what is actually before the court is a protest under Rule 40(6) of the *Probate and Administration Rules*. I will thus address the objection as if it were a protest.
33. I note that from the 1st Respondent's testimony that Plot in Magisu Market, Bondo Division, Homa Bay and the ancestral land in Homa Bay measuring about 5 acres do not form part of the deceased's estate.
34. This position is uncontroverted and I therefore find that these properties are not available for distribution.



35. The respondents have proposed that the Benefits from Kenya Posts & Telecommunications Corporation (KP & TC), National Bank of Kenya Limited A/C No. 30107468, Nakuru, Kenya Finance Bank Limited (in receivership) A/c No. 021-463 and Motor Vehicle Registration No. KPB 667 be distributed wholly to the 1st Respondent Mary Akumu Ongaro.
36. There is no opposition to this mode of distribution and I therefore adopt the same as an order of this court.
37. I will now deal with the property that is contention.
38. It is clear from the Objector's testimony and submissions that she is not objecting to the issued grant herein but rather, with the proposed mode of distribution and specifically in regards to Nakuru Municipality Block 3/1020. The administrator has proposed that it be distributed to Pascal, for the reasons that he solely purchased it when the family failed to secure the purchaser of the same and the proceeds thereof were used to renovate the house in the Bondo Nya'ngoma land and build rental units thereon.
39. All the beneficiaries, save for the protester, are in agreement.
40. According to the protester, this property should be sold and the proceeds be distributed equally amongst all the deceased's beneficiaries.
41. I have duly considered the parties' submissions in that regard.
42. The administrator is the widow of the deceased. It is trite law that before any immovable property of the deceased estate is sold or transferred, there has to be authority of the court. This is expressly set under section 37 of the [Law of Succession Act](#) as follows

“ 37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of [this Act](#), with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.”

43. Further under 82 of [the Act](#), no immovable property of a deceased may be sold by an administrator before the confirmation of the grant. The said section provides as follows;

“ 82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;



- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;”

44. It is very evident that the “sale” of the property to Pascal was done before the confirmation of the grant, and without any authority from the court. The said sale cannot be sanctioned, since it amounts to intermeddling with the estate.
45. In my view, the actions were the family were not prompted by any ill intentions. It appears like they wanted to have the property remain within the family hence the sale to Pascal. However, the purported sale runs afoul of the law, for the reasons that I have given hereinabove.
46. The Respondents herein have alleged that they held a family meeting to discuss the distribution of the aforesaid property and all beneficiaries including the objector attended the meeting and agreed that one of the beneficiaries, Pascal, should purchase the subject property. The Objector has disputed attending such a meeting. She claims that the signature on the consent isn’t hers.
47. The *Evidence Act*, Chapter 80 of the Laws of Kenya, demands that he who alleges must prove. Specifically, Sections 107 and 109 thereof which provide that:
- Section 107 states thus:
- (1). Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
48. Section 109 is to the effect that:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
49. It was incumbent upon the Respondent therefore to prove that the objector was present in the alleged meeting and consented to the said beneficiary purchasing the subject land. The Respondent failed to do so as no minutes of the purported family meeting has been presented before this court.
50. Additionally, there is no sale agreement on record to prove that the said Pascal Waka Ongaro duly purchased the aforesaid property and documentary evidence to show that the proceeds thereof were used to develop the House in Bondo Ny’angoma and rental units thereon.



51. Although the protester may be termed as a black sheep in the family or a bad apple in the cart, she has a valid point. Her consent, even if it is a minority one was needed.
52. Even if there was a consent of the protester as alleged, the sale still required the authority of the court and as I have stated that was not sought.
53. Although the sale of the property was made in good faith, the fact is that it is contrary to the law and cannot be confirmed. In short, the court finds that the sale in question is invalid in law.
54. In essence, the objector wants that in the event the property is sold, then she gets her rightful share. That right is acknowledged. All the deceased's beneficiaries have a right to equal protection and equal benefit of the law under Article 27(1) of the *constitution*.
55. In view of the foregoing, I hold that the protest dated 24th August, 2023 is merited.
56. So what orders should this court issue?
57. I note the Objector is not opposed to the sale of the subject property. Considering the findings above, I believe the interest of justice would be best served if the subject land is sold as proposed and all the beneficiaries, including the Objector, be given their share.
58. In the end, I make the following orders in respect to the summons for confirmation and the protest: -
 - i. Plot in Magisu Market, Bondo Division, Homa Bay and the ancestral land in Homa Bay measuring about 5 acres do not form part of the deceased's estate and the same is not available for distribution.
 - ii. Benefits from Kenya Posts & Telecommunications Corporation (KP & TC), National Bank of Kenya Limited A/C No. 30107468, Nakuru, Kenya Finance Bank Limited (in receivership) A/c No. 021-463 and Motor Vehicle Registration No. KPB 667 be distributed wholly to the 1st Respondent Mary Akumu Ongaro.
 - iii. Parcel of land known as Nakuru Municipality Block 3/1020 to be sold and proceeds shared among the beneficiaries and if already sold, the Objector be given her share, equal to all the other beneficiaries.
 - iv. The parties to try and agree on a reasonable value for the property between themselves as a family and in the event they cannot agree then the said property is to be valued by a reputable registered valuation entity. In that event the beneficiaries will share the cost of the said valuation.
 - v. Each party shall bear their own costs.
59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Objector – present in person

Mr. Waiganj for Administrator/Respondent

