



REPUBLIC OF KENYA



In re the Estate of the Late Gordon Mark Agolla Honga (Deceased) (Succession Cause 792 of 2007) [2024] KEHC 10163 (KLR) (15 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 792 OF 2007
RE ABURILI, J
AUGUST 15, 2024
IN THE MATTER OF THE ESTATE OF THE LATE
GORDON MARK AGOLLA HONGA(DECEASED)**

**IN THE MATTER OF
IN THE MATTER OF AN APPLICATION BY DANIEL OTIENO
AGOLA PETITIONER**

AND

**IN THE MATTER OF AN APPLICATION BY JOSHUA
ODONGO INTERESTED PARTY
IN THE MATTER OF AN APPLICATION BY JAMBOLEO EAST AFRICA
AUTO ENGINEERING INTERESTED PARTY**

RULING

1. This is an application for confirmation of Grant before the expiry of six (6) Months after the making of a grant of representation of a deceased person. The court is empowered to make an order for early confirmation of grant under section 71 (3) of the Law of Successions Act as follows:
 - 71 After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.
2. The Grant of Letters of Administration Intestate herein was made to the petitioner, Daniel Otieno Agola on 12th July 2022 and it has been more than two years since the grant was issued.
3. According to the petitioner, the estate of the deceased comprised of the following assets;
 - i. Land Parcel Kisumu/Kanyakwar Dago/604



- ii. Land Parcel Kisumu/Kanyakwar/1460
 - iii. Land Parcel Kisumu/Kanyakwar/2391
 - iv. Land Parcel Kisumu/Kanyakwar/469
4. When the petitioner filed summons for confirmation of grant, protests were filed challenging the inclusion of other parcels that formed originally, Kisumu/Kanyakwar/469 and Kisumu/Kanyakwar B/385 as part of the Estate property on account that the land was sold to third parties who have even developed it.
 5. It was the petitioner's testimony that he had never seen any agreement between the deceased and another person for the sale of land nor was there any consent that showed that the deceased sub-divided land parcel Kisumu/Kanyakwar/469 into several other titles including 844 corrected to read (PDP N9/2011/01). The petitioner testified that there was no challenge to the Gazette Notice of 17.7.2017 by the National Land Commission.
 6. It was the petitioner's testimony that his step mother and her children ran away after selling their share of the deceased's land after his death but that he had nonetheless provided for them shares from the recovered land which had been sold before the grant was obtained and confirmed. He testified that the rest of the family members gave him consent to propose the mode of distribution of the deceased's estate.
 7. The petitioner further testified that there was no agreement between the interested party and the deceased, nor were there survey reports for sub division of the land in issue as the interested party surrendered the title to the Commissioner of Lands and that Mr. Yogo, advocate for the interested party, should recuse himself because he acted for the parties in the transaction.
 8. The petitioner further testified that there was no challenge to the adjudication appeal and that the acreage alleged to have been bought by the interested party was unknown and further that there was no agreement exhibited for the sale of land.
 9. It was the petitioner's case that the 2nd interested party had not exhibited any title deed, search certificate, consent from the previous owner or order challenging the determination by the National Land Commission.
 10. The petitioner further testified that the matter regarding parcel Kisumu/Kanyakwar 'B' 385 was before the land court vide Kisumu ELC Case No. 62 of 2014 and that the protest should be dismissed.
 11. The petitioner further testified that Mr. Yogo had a conflict of interest in the matter because he witnessed the sale agreement between the parties and that he cannot claim land whose title was surrendered to the Commissioner of Lands.
 12. Abigail Agolla testified and reiterated that their home had 5 wives and that the mother of the last house sold their home and left then she died. It was her testimony that they could not allow people to evict them from their home. It was her testimony that the family had a Whatsapp wall where the petitioner informed all members of the family to come to court but they were unwilling.
 13. It was her testimony that her and the petitioner as well as their brother Titus all came from the 1st house and that they agreed that none of their siblings would be left out of the distribution of the deceased's estate.
 14. James Opere testified that they had tried to come together as a family and agree on the distribution of the deceased's estate.



15. Paul Timothy Agolla, a sibling of the petitioner testified that their family was polygamous as there were 5 houses and that the rest of the family members were not for the distribution and had not consented to the same.
16. Mr. Yogo on behalf of the interested party submitted adopting the affidavit of protest filed on behalf of his client.
17. It was submitted that parcel Kisumu/Kanyakwar 'B'/844 had been included in the estate yet the 1st interested party had filed an application determined on 18.11.2019 revoking the grant and finding that the said parcel does not form part of the deceased's estate.
18. Mr. Wanyanga for the 2nd interested party submitted that parcel Kisumu/Kanyakwar 'B'/844 should be part of the deceased's estate because the grant acquired was revoked due to misrepresentation.
19. It was further submitted that the property claimed by the 1st interested party was not the one before court as there was an error on the ground followed by an exchange and surrender of title for Kisumu/Kanyakwar 'B'/844 with the land given to the 1st interested party number N9/2011/01 that had been erroneously identified as Kisumu/Kanyakwar 'B'/844.
20. Mr. Wanyanga further submitted that they sought to review the revocation but the administrator died. He further submitted that Kisumu/Kanyakwar 'B'/844 should be given to his client as the deceased legally sold it to the 2nd interested party. It was his submission that the said parcel was sold to the 1st interested party by one Kennedy and as such should be part of the deceased's estate and be distributed to the 2nd interested party.
21. Mr. Omondi T. for Tunza Housing submitted that he relied on the affidavit of Richard Oketch deposed on the 24.1.2024 and that he opposed the distribution of Kisumu/Kanyakwar 'B'/385 as his client was a bonafide purchaser from one Sylvanus Otieno Ogolla and had a title issued on the 12.7.2012.

Analysis & Determination

22. In terms of section 71 (3) of the *Law of Succession Act*, the court has confirmed from the record that there is no pending application for dependency by any person and that some of the beneficiaries of the estate have consented to the proposed distribution, while from the testimony of Paul Timothy Agolla, he was against the confirmation of the grant stating that the rest of the family members had not consented to the distribution fronted by the petitioner. Those beneficiaries opposed nonetheless, did not file any protests to the distribution.
23. Regarding the estate assets and whether the same have been identified, the petitioner identified the assets as listed herein above. However, there is clearly a dispute over Land Parcel Kisumu/Kanyakwar/469 as it was originally before subdivision and Kisumu/Kanyakwar B/385 which the interested parties allege was sub divided and subsequently sold to them.
24. The petitioner on his part is adamant that the interested party surrendered the resultant title, Kisumu/Kanyakwar 'B'/844 to the Commissioner of Lands and that subsequently there was no challenge to the Gazette Notice of 17.7.2017 by the National Land Commission.
25. It is apparent that there is dispute over the parcels protested over by the protestors herein and that the said parcels of land are not registered in the names of the deceased intestate. Distribution of an estate can only be carried out on property which is registered in the name of the deceased. When a dispute regarding ownership in respect of the property of a deceased person arises, then the court can



set aside the share in dispute to await the outcome of the resolution of the dispute from the court with jurisdiction. In this case, the shares in question are already in the names of third parties and therefore what the administrator should do is not to distribute such properties but to use the powers of an administrator and claim for such property by filing an appropriate suit for recovery and the suit can only be filed before a court of competent jurisdiction.

26. Disputes relating to ownership of land as is the case here with both interested parties independently claiming ownership and mistake in the title to the physical property No Kisumu/Kanyakwar B/844 which originally formed part of Kisumu/Kanyakwar B/844 469 or even No.385 can only be determined by the Environment and Land Court. Once the ownership of the suit property is ascertained by the Environment and Land Court, the probate court may proceed to distribute the said property to the rightful beneficiaries.
27. In the case of Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, it was held that:

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”
28. In this case, there is a serious dispute as to whether the land Parcel Kisumu/Kanyakwar/469 as subsequently subdivided, with the 2nd interested party even claiming that there is an error regarding the actual parcel owing to alleged exchange of parcels. There is also dispute over ownership of Kisumu/Kanyakwar B 385. That dispute cannot be fully resolved by this court, noting that the said land is not registered in the name of the deceased intestate.
29. Section 2 of the *Law of Succession Act* defines what an estate is. Property which is not registered in the name of the deceased is not available for distribution among his dependants. In addition, land given to other parties during the lifetime of the deceased and is already in the name of the third party is property which is not owned by the deceased and cannot form part of his estate and is therefore not available for distribution. It can only be taken into account when distributing the net intestate estate of the deceased to the dependants. However, where the administrator alleges fraud in the transfer of the said land to third parties, then he can file suit before the Environment and Land Court for determination of ownership thereof.
30. Only the Environment and Land Court has jurisdiction to resolve such a dispute on ownership of the disputed parcel.
31. Accordingly, I hereby direct that the said parcel of land Kisumu/Kanyakwar/469 as it was originally and as was subsequently subdivided into other portions, plus all those subsequent parcels derived from the said parcel as well as Kisumu/Kanyakwar B 385 not being registered in the name of the deceased herein cannot be distributed to the beneficiaries of the estate until the determination of the issue of ownership by the relevant court being the Environment and Land Court
32. As regards the other assets listed in the summons for confirmation of grant, the court has confirmed that the estate assets have been identified and the beneficiaries identified. However, regarding Kisumu/Kanyakwar/2391, the distribution is not clear. The NO transaction as per their agreement as a family statement does not make any sense to this court in terms of distribution of an estate which distribution must be in the clearest terms.



33. Additionally, this court notes that the petitioner had distributed Land Parcel Kisumu/Kanyakwar/469 originally as subsequently subdivided, to himself as is evident in the proposed summons for confirmation of grant.
34. Since that land is not, at this stage, part of the state of the deceased since it is registered in the names of third parties after subdivision, pending the determination of the ownership dispute, this court would have ironically not have provided for the petitioner. What then must this court do?
35. Rule 73 of the Probate and Administration Rules provides that: -
- “73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
36. This provision cloths the High Court with wide discretion to do what is necessary to ensure that the ends of justice are met.
37. Accordingly, to ensure that none of the deceased’s beneficiaries are not provided for in the estate, I hereby order that the petitioner files into court a fresh schedule of distribution of the estate redistributing the assets which are not subject to any dispute, ensuring that each beneficiary, including himself are adequately provided for so that no beneficiary is prejudiced or disadvantaged.
38. In view of the above findings, I decline to confirm the grant as proposed by the petitioner and order that a fresh summons for confirmation of the grant be filed taking into account the directions by the court on the land that is set aside for determination of the dispute over ownership and the redistribution of the remainder of the estate to all the beneficiaries in a manner that will not disinherit any beneficiary.
39. Finally, on the issue of the firm of Yogo Advocates being conflicted, I find no evidence of such conflict of interest and or any prejudice that the petitioner will suffer by virtue of the advocate having acted for the parties in the sale transaction.
40. There is no evidence that Mr. Yogo is required in these proceedings to appear as a witness as contemplated in Rule 9 of the Advocates (Practice) Rules that:
- “9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence, whether verbally or by declaration or affidavit, he shall not continue to appear...”
41. The Law Society of Kenya (LSK) Code of Conduct and Ethics for Advocates 2016 Rule 6 paragraph 87-91, deal with issue of conflict of interest. Paragraph 87 – 88 thereof defines what conflict of interest entails while Section 89 gives the rationale for the rule against conflict of interest. Paragraph 91 cites the incidents where conflict of interest may arise:
- “Situations in which a conflict of interest might arise include:
- (a) Where the interests of one client are directly adverse to those of another client being represented by the advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;



- (b) Where the nature or scope of representation of one client will be materially limited by the advocate's responsibilities to another client, a former client, a third person or by the personal interests of the advocate;
- (c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client."

42. In *Dorris Kanini Ndunda v Family Bank Ltd* (2019) eKLR and *Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others* (2017) eKLR. the court held that each case must be considered on its own peculiar facts and that the court will intervene to stop counsel from representing a client if satisfied that real prejudice is likely to be caused to the former client. The court also considered representation by an Advocate of their own choice as being a Constitutional right which can only be taken away in exceptional circumstances.

43. In *William Audi Odode & another v John Yier & another*, the Court of Appeal Nairobi Application No.360/2004, stated as follows:

"I must state on the outset that it is not the business of the courts to tell litigants which Advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interest of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel."

44. The above reasoning stems from the fact that legal representation is a Constitutional right that cannot be taken away on flimsy grounds. There must be valid reasons for a court to deprive a litigant of the said right.

45. Again, the issue of disqualification was considered by J. Gikonyo in *Dorothy Seyanoi Moschoni v Andrew Stuart & another* (2014) KLR where the Judge stated that:

"[12]. I will not re-invent the wheel. All the cases which have been quoted by counsel are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that "these advocates participated in the drawing and attestation of the Deeds in dispute"; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant says "I intend to call them as witnesses". What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be "their counsel" in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to



legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be obvious of the centrality of the right to legal representation in *the Constitution* as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy” Or is there other evidence which will serve the same purpose as the evidence by counsel. Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and real prejudice, then a disqualification or counsel will not be ordered.

(23) In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the applicant by representation of the 1st respondent by the said firm of advocates. And I so hold fully aware of the applicant’s desire to call them as witnesses and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious.”

46. Accordingly, the claim by the petitioner against Mr. Yogo advocate, of conflict of interest, having regard to the circumstances of this case as a whole, is not merited and is dismissed.
47. In the end, o order that the petitioner does file fresh summons for confirmation of grant within sixty days of today. Mention on 17/10/2024 to confirm compliance.
48. Each party to bear their own costs of the summons and the protests filed.
49. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

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