



In re Estate of Ephraim Odhiambo Dhuong'o (Deceased) (Succession Cause 467 of 2009) [2024] KEHC 13556 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE 467 OF 2009
MS SHARIFF, J
OCTOBER 25, 2024**

BETWEEN

FRANCIS EPHRAIM ONYANGO 1ST PETITIONER

GEORGE ODHIAMBO ODHIAMBO 2ND PETITIONER

AND

GEOFFREY AGGREY ODHIAMBO 1ST OBJECTOR

HEYWOOD MACDONALD ODHIAMBO 2ND OBJECTOR

RULING

1. The petitioner filed a summons for the summons of the confirmation of grant dated 11th May, 2021 seeking confirmation of the grant issued to the petitioner on 25th November, 2009.
2. Subsequent to the filing of the summons, protests were filed by the objectors who deponed inter alia that the deceased was polygamous whereby one widow is still alive and had 9 children. That the deceased had one parcel Ugenya/Simenya/150. It is the 1st protestor's disposition that before his demise, the deceased had demarcated the land according to his sons. That they are not agreeable to the mode of distribution proposed by the petitioner.
3. The 2nd protestor deponed that the petitioner filed the cause without disclosing material facts for instance the fact of the deceased's polygamy, that the deceased had never demarcated any portion of the land and that the petitioner did not involve his siblings in the process leading to the issuance of the grant.
4. Upon filing protest, other beneficiaries filed their affidavits in support of the mode of distribution; that is, Jessica Aoko Odhiambo, Margaret Akinyi, Cannon Omondi Odhiambo, Essau Ouma Odhiambo, Zachary Ochieng Odhiambo, George Odhiambo Odhiambo.
5. By directions of the court, the protest was disposed of by way of submissions. Both parties complied.



Analysis and determination:

6. I have perused the affidavits herein and the submissions herein and my view of the matter is that the issue for determination is whether the protest is merited.
7. The main contention by the protestors is that the deceased had never demarcated his parcel of land as proposed by the petitioner. The protestors also depone that the petitioner did not involve them in the process leading to the issuance of the grant. The protestors depone that the deceased was a polygamist with 16 children although one of the widows is also deceased.
8. The petitioner's further affidavit however has a list of 21 children some of them deceased.
9. The protest was filed after the petitioner filed the summons for confirmation of grant as per a mutation form annexed thereto with 12 portions of land. The consent to the mode of confirmation, accompanying the summons has a list of 13 individuals and only 8 of them appended their signatures thereto. There are 2 minors in that list though their names do not appear either in the chief's letter or form P & A 38.
10. In the said consent accompanying the summons for confirmation, the 2nd protestor did not append his signature.
11. Taking the above into account, I have also considered the petitioner's affidavit sworn on 2nd February, 2022 wherein, he admits at paragraph 6 that the deceased was survived by sons, daughters and one widow. Surprisingly, the daughters and widow do not appear in either the chief's letter, consent as required by Form P&A 38 or the summons for confirmation of grant or the consent thereto.
12. As relates to form 38 which is the consent by a person of equal or lesser priority, the law under Rule 26(a) and (2) of the *Probate and Administration Rules* provides as follows:-
 - " 26. Letters of administration shall not be granted to any applicant without notice
(1) to every other person entitled in the same degree as or in priority to the applicant.
 - (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."
13. Clearly, the above provision was not complied with.
14. I have also examined the summons for confirmation of grant and the accompanying consent which is signed by a few individuals; the petitioner's brothers to the exclusion of the sisters and the widow.
15. Rule 40(8) of the *Probate and Administration Rules* provide as follows;

“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be



for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit”.

16. The above taken in light of the petitioner’s admissions in his affidavits leads to the conclusion that the summons for confirmation of grant falls short of the required legal threshold. I get guidance from the decision *In Estate Ibrahim Likabo Mibeso (Deceased)* [2020] eKLR where the court while addressing the issue on failure to file Form 37 stated:

“...the administrator did not file a consent on distribution, in Form 37, as contemplated by Rule 40(8), duly signed by all the survivors. Rule 40(8) is in mandatory terms. The filing of Form 37, duly executed by survivors guides the court as to whether the survivors are aware of the application for confirmation of grant, and if they are, it gives an indication of those who support the application, and those who do not. It is from the contents of Form 37 that the court is able to pick out the survivors who it may have to direct to file affidavits of protest. The administrator did not comply with Rule 40(8).

17. Premised upon the above reasons, a conclusion cannot be escaped that the manner in which the petition for letters of administration was filed and sought to be confirmed is non-compliant with the above-stated legal provisions. I therefore order that the summons for the confirmation of grant dated 11th May, 2021 be struck out and fresh summons be filed by the petitioner within 30 days as of today.
18. Each party shall bear its own costs.

DELIVERED, DATED, AND SIGNED AT KISUMU THIS 25TH DAY OF OCTOBER 2024.

M. S. SHARIFF

JUDGE

