



**In re Estate of Odwogo Amaholo (Deceased) (Succession Cause  
358 of 2010) [2024] KEHC 14655 (KLR) (26 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14655 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 358 OF 2010**

**S MBUNGI, J**

**NOVEMBER 26, 2024**

**IN THE MATTER OF THE ESTATE OF ODWOGO AMAHOLO .....(DECEASED)**

**IN THE MATTER OF**

**WELLINGTON EKHUNYA ODUOGO ..... OBJECTOR**

**AND**

**CALEB TEMBA ODUOGO ..... RESPONDENT**

**RULING**

**Background**

1. On 26.07.2022, the court identified 6 beneficiaries of the estate of the deceased and directed that each gets an equal share in the estate. Two different survey reports were filed and the court ordered that the distribution be done in accordance with the Survey Report dated 26.01.2023 by Plan B Consultants save that the portion marked (C) said to be occupied by Henry Magwaga be assigned to Caleb Temba Odwogo and be registered in his name but it not be alienated pending the determination of Kakamega CM. ELC Case No. E211/2022.
2. However, the administrators herein had difficulty in implementing the certificate of confirmation of grant and through his counsel, the 2<sup>nd</sup> Administrator (applicant herein) filed a motion dated 26.07.2023 seeking review of orders of confirmation of grant on account of impossible implementation.
3. On the other hand, the counsel for the 1<sup>st</sup> Administrator (petitioner/respondent herein) also filed an application dated 10.08.2023 seeking that the Deputy Registrar executes deeds of transfer.
4. Counsels agreed that both applications be canvassed by way of written submissions.



### **A. Application dated 26<sup>th</sup> July, 2024.**

5. The first application sought the following orders:
  - I. That The Honorable court be pleased to review the orders made on the 26<sup>th</sup> day of July 2022 since the implementation of the orders has become impossible due to the current occupation of the parcel of land by a 3<sup>rd</sup> party.
  - II. That the Honorable court be pleased to share out the remaining portion of land parcel number Butso/2835 after removing the portion already occupied by Henry Magwaga.
  - III. That the remaining portion of land parcel number Butso/2835 be shared equally between the following:
    - (1) Wellington Ekhuya Oduogo
    - (2) Patrick Lumumba Oduogo
    - (3) Dixon Afubwa Otuya
    - (4) Geoffrey Oduogo
    - (5) Eunice Achungo Mwanzi.
  - IV. That during the sharing, the surveyor to take into consideration the positions already occupied by the respective parties.
  - V. That Caleb Temba Oduogo's share to await the outcome of the case at the land and Environment Court between himself and Henry Magwaga same being Kakamega CMCL&E NO. 211 OF 2022.
6. The application was premised on the grounds that this Honorable court admitted the survey report filed by a private surveyor which did not consider the portion of land occupied by Henry Magwaga and dismissed the report filed by the County Surveyor. Further, the applicant stated that the report filed by the private surveyor has given the portion occupied by Henry Magwaga and Patrick Lumumba Oduogo to different parties hence making it impossible to implement on the ground. The applicant submitted that the implementation of the survey report by the private surveyor would bring chaos to the ground and the same ought to be reviewed.
7. The motion was supported by an affidavit sworn by the applicant who reiterated the contents of the application.

### **Applicant's Case.**

8. In his submissions for the application dated 26.07.2023, the applicant submitted that the equal distribution ordered by the court should not include the 1<sup>st</sup> Administrator since his share is contained in the portion occupied by Henry Magwaga who was sold part of the estate by the 1<sup>st</sup> Administrator.
9. The 2<sup>nd</sup> administrator urged that the certificate of confirmation of grant be amended to exclude the 1<sup>st</sup> Administrator from getting an equal share of the estate since his share is included in the portion occupied by Henry Magwaga.



## **Respondent's Case.**

10. The 1<sup>st</sup> Administrator(respondent) filed a replying affidavit on 20.11.2024 in response to the application dated 26.07.2023 where he stated that the Honorable judge gave directions on the way forward in order to accomplish the administration of the deceased's estate which was accurately adhered to by the 1st Administrator/Applicant.
11. The respondent also stated that the private surveyor's report and sketch on the proposed partition as per the certificate of confirmation dated 13<sup>th</sup> October 2022 was clear and the 1<sup>st</sup> administrator never occupied two portions as averred by the 2<sup>nd</sup> administrator but only allocated a portion marked "C" on the sketch map which is currently occupied by Henry Magwaga and the same mode of distribution was directed by this Honorable court.
12. He further stated that the applicant's prayers cannot be implemented in particular prayer "V" as the deceased's' estate has to be administered first in order to be dealt with in a Kakamega CMCL & E NO. 211 of 2023.
13. The 1<sup>st</sup> Administrator also submitted that currently no other beneficiaries occupy the deceased's estate namely L.R.No Butsotso/SHIKOTI/2835 and all of them have signed the transmission instruments except the 2<sup>nd</sup> administrator/respondent who has declined so to do with ulterior motive, adding that the 2<sup>nd</sup> administrator's application for review does not meet the threshold set out in order 45 of the Civil Procedure Rules 2010.
14. Lastly, the respondent deponed that the subject matter herein, whether the issued certificate of confirmation of a grant can be implemented or not has been adjudicated upon and determined in the previous application where the Honorable Judge ordered that the 1<sup>st</sup> administrator be awarded the portion that is currently occupied by one Henry Magwaga thus the 2<sup>nd</sup> administrator/respondent's application of review is a res judicata and the same ought to be dismissed with costs.
15. In his submissions, the 1<sup>st</sup> administrator stated that the 2<sup>nd</sup> administrator's application for review fails to meet the minimum threshold as set out Under Section 80 of the Civil Procedure Act and had been filed after an inordinately long period of time being one year since the orders of this court were made.
16. Further, the rulings of the court were made in the presence of all parties and their counsels, including the alleged purchaser and no objections were raised at the time.
17. Lastly, he submitted that the parcel of land comprising the estate of the deceased is a commercial plot with the sole occupant currently being the alleged purchaser. He urged that the application dated 26.07.2023 be dismissed.

## **B. Application dated 10<sup>th</sup> August, 2024.**

18. The application filed under Certificate of Urgency by the Objector herein dated the 10<sup>th</sup> August, 2024 sought the following orders: -
  - I. Spent
  - II. That this Honorable court be pleased to direct the Deputy Registrar of this court to execute and sign the relevant mutation forms, transfer forms and all other necessary documents on behalf of the co. Administrators/beneficiaries hereof who have refused to sign the same.
  - III. That the production of the original title Deed in respect of L.R.No \_Butsotso/Shikoti/2835 be dispensed with in the first instance.



- IV. That costs of this application be provided for.
19. The application was premised on the grounds in the Objector's supporting affidavit sworn on 10.08.2023 as follows: -
- a. That the objector is the co-administrator together with the applicant herein.
  - b. That this matter was contested, heard and determined by this Honorable court.
  - c. That the 2<sup>nd</sup> Administrator has refused to surrender the original Title Deed of L.R.No Butsotso/Shikoti/ 2835 in his possession.
  - d. That consequently a grant of letters of administration intestate together with certificate of confirmation of a grant were issued.
  - e. That the 2<sup>nd</sup> Administrator and other beneficiaries have refused to execute and/or sign the transfer/transmission instruments in order to frustrate the finalization of this cause.
  - f. That the court orders cannot be issued in vain.
  - g. That the petitioner is desirous to have the said court documents/ orders implemented in order to administer the deceased's estate according to law.

**Applicant's (1<sup>st</sup> Administrator) Case.**

20. Vide submissions dated 06.12.2023, the applicant submitted that despite being jointly appointed as administrators in respect to the estate of the deceased, the 2<sup>nd</sup> administrator declined to co-operate in the speedy transmission of the estate of the deceased to the beneficiaries, thus forming the basis of the application filed on the 10.08.2023 seeking to have the Deputy Registrar sign the requisite transmission forms on behalf of the 2<sup>nd</sup> administrator who refused unnecessarily the finalization of the succession cause.
21. The 1<sup>st</sup> administrator urged the court to invoke the provisions of Rule 73 of the Probate and Administration Rules and exercise its inherent powers to grant the orders sought in his application in order to ensure that the end of justice to be met.

**Respondent's Case.**

22. The 2<sup>nd</sup> administrator filed a replying affidavit to the application where he stated that the 1<sup>st</sup> Administrator/Applicant is not entitled to the orders sought in the application and the certificate of confirmation of grant cannot be implemented on the ground unless the same is amended.
23. The 1<sup>st</sup> administrator filed a further replying affidavit in response to the 1<sup>st</sup> administrator where he affirmed his past averments, stating that the 2<sup>nd</sup> administrator's replying affidavit is full of falsehood.
24. He stated that he declined to sign the transmission documents after being informed by the surveyor that it was impossible to implement the certificate of confirmation of grant without amending the same.
25. Further, the 2<sup>nd</sup> administrator stated that the certificate of confirmation of grant has given the 1<sup>st</sup> Administrator/Applicant another portion of land and yet he is supposed to get a share from the portion of land held by Henry Magwaga and thus should wait until the case between himself and Henry Magwaga is heard and determined by the Honorable court.



26. In his submissions, he stated that the 1<sup>st</sup> administrator did not disclose to the court reasons as to why the other beneficiaries had declined to sign the relevant documents, nor did he annex the documents which he had prepared that the other beneficiaries declined to sign.
27. Further, he averred that the 1<sup>st</sup> administrator had not disclosed that there is a problem of implementing the certificate of confirmation of grant since he sold part of the estate to purchasers.
28. He urged that the application dated 26.07.2023 be allowed and the application dated 10.08.2023 be dismissed with costs.

### **Analysis and Determination.**

29. For ease of reference and clarity, I will go by the names of the parties. Caleb Temba Odwogo is the 1<sup>st</sup> Administrator. Wellington Ekhunya Oduogo is the 2<sup>nd</sup> Administrator.
30. I shall start with the application dated 26.07.2023 filed by Wellington Ekhunya where he seeks review of the court's orders issued on 26.07.2022. In that ruling, the court ordered that the land in issue be surveyed into 6 equal parts, each of the 6 beneficiaries getting a portion. The portion initially assigned to Elizabeth Oduogo Imali shall go to Dickson Otuya. The court further noted the dispute between Mr. Henry Victor Magwaga and Caleb Temba Odwogo to be resolved by ELC court.
31. I have also seen another order issued by the court on 19<sup>th</sup> July, 2023 which ordered as follows:
  - i. That the Court Orders of 26.7.2022 are clear and unambiguous for purposes of implementation. It is the County Surveyor who seems keen to upset the Court Order by carrying out his work contrary to the Court Order. For that departure, the Survey Report by the County Surveyor Kakamega be and is hereby struck out and expunged from the Court record.
  - ii. That the Court has seen the Survey Report by Plan B Consultants dated the 26.01.2023 which indeed subdivides the land into six (6) equal parts. There is a further Report dated 20.4.2023 which says Henry Magwaga occupies the portion Marked (C) on the Survey Scheme. The Court hereby finds the Report by Plan B Consultants to comply with the decision of the Court and direct that the distribution be done in accordance with it SAVE that portion marked (C) be assigned to Mr. Caleb Temba Odwogo and be registered in his name BUT it be not alienated pending the determination of Kakamega CM. ELC. Case No. E211/2022.
  - iii. That the sub-division Schemes prepared by Plan B Consultants be presented for registration so that portions marked (C) goes to Caleb Temba Odwogo.
32. Wellington Ekhunya Oduogo, the 2<sup>nd</sup> Administrator wants the certificate of confirmation of grant to be reviewed in that the portion occupied by Henry Magwaga be hived out and the remaining portion be shared equally between the 5 beneficiaries namely; Wellington Ekhunya Oduogo, Patrick Lumumba Oduogo, Dixon Afubwa Otuya, Geoffrey Oduogo and Eunice Achungo Mwanzi leaving out Caleb Temba Oduogo whom he suggests to wait to know his fate after the resolution of Kakamega CMCL&E No. 211 OF 2022.
33. The respondent, Caleb Temba Oduogo (1<sup>st</sup> administrator), avers that the issue raised by Wellington Ekhunya Oduogo was settled by the court in its ruling of 26.07.2022 where the Honorable Judge ordered that the 1<sup>st</sup> administrator be awarded the portion that is currently occupied by one Henry Magwaga thus the 2<sup>nd</sup> administrator's application of review is a res judicata and the same ought to be dismissed with costs.



34. I have seen the court orders of 19<sup>th</sup> July, 2023 where the court gave the orders as highlighted in paragraph 31 of this ruling.
35. Those orders are very clear. Caleb is supposed to be registered as the owner of portion marked “C” which as per the survey scheme was to go to Henry Magwaga with a right that he was not supposed to dispose it until the determination of Kakamega CMCL&E No. 211 OF 2022.
36. To me what the applicant (Wellington Ekhunya Oduogo) is asking the court is to have the land divided into 6 portions with the portion meant for Caleb Temba going to Henry Magwaga. An issue which this court resolved in its ruling captured in paragraph 31 above. I therefore agree with Caleb Temba Oduogo that this issue is res judicata. The application dated 26<sup>th</sup> July, 2023 is dismissed save that the distribution should take into account the positions already occupied by the beneficiaries.
37. This being a family matter, each party to bear its own costs.

**Notice of Motion dated 10<sup>th</sup> August, 2023**

38. I have seen the prayers sought. I have no difficulty in granting for we have to have a closure in the administration of the deceased’s estate therefore if Wellington Ekhunya Oduogo(2<sup>nd</sup> Administrator) and any other person who is supposed to sign any documents required in facilitating the administration and transmission of the deceased’s estate as per the latest certificate of confirmation issued by the court the Deputy Registrar of this court is directed to execute and sign such documents on behalf of those who refuse to sign. The production of original title deed in respect of L.R No. Butso/2835 if it cannot be found, it’s production be dispensed with.
39. This being a family matter, each party to bear its own costs.
40. Right of appeal 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Applicant – present

Respondent – absent

Mr. Mango for the 1<sup>st</sup> Administrator present

Court Assistant – Elizabeth Angong’a

