



**In re Estate of Jeremiah Odera Mapesa (Deceased) (Succession Cause 560 of 2011) [2023] KEHC 2838 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 560 OF 2011**

**WM MUSYOKA, J**

**MARCH 24, 2023**

**IN THE MATTER OF THE ESTATE OF JEREMIAH ODERA MAPESA (DECEASED)**

**RULING**

1. Am called upon to determine an application for confirmation of grant, dated May 21, 2021.
2. It is brought at the instance of Emily Judith Odera, the administratrix. Her affidavit was sworn on May 21, 2021. She discloses that the deceased had been survived by 4 widows, Philice Nyangweso Odera, Risper Andeso Odera, Rose Isichi Evasiswa, Emily Judith Odera and Evalyne Ngisu; 7 sons, being Julius Onjiro Odera Mapesa, Gilbert Lime Jeremiah, MacDonald Omukunda Odera, Francis Otiangala Mapesa, Miriam Odera, Songa Odera and Francis Mapesa Odera; 3 daughters, being Rose Mbaye Odera, Zalpha Osimbo Odera and Noel Nyasiri Odera; and 1 grandson, Rolland Songa Odera. 4 other individuals are listed as dependants, being Saimoni Shitemi, Andati Onjiro, Nelson Anunda and Elphas Keya. The assets said to make up the estate are Butsotso/Shibeye/717, Butsotso/Shibeye/1536, Butsotso/Bukura/861, Butsotso/Bukura/876, Marama/Lunza/668, Marama/Lunza/1622, Nairobi Plot 1019 and Bukura Kiosk.
3. It is proposed that the assets be distributed as per the houses. The 1<sup>st</sup> house, of Philice Nyangweso Odera, is allocated 7 acres in Butsotso/Shibeye/1536, the whole of Butsotso/Bukura/861, ½ share of Nairobi Plot 1019 and 1 door of Bukura Kiosk. The 2<sup>nd</sup> house, of Risper Andeso Odera, is allocated what remains of Marama/Lunza/1622 after Rose Isichi has been given 2½ acres, the whole of Butsotso/Shibeye/717 and 1 door of Bukura Kiosk. The 3<sup>rd</sup> house, of Emily Judith Odera, is allocated the whole of Marama/Lunza/668 and 1 door of Bukura Kiosk. The 4<sup>th</sup> house, of Rose Isichi Evasiswa, is allocated 2½ acres of Marama/Lunza/1622 and 1 door of Bukura Kiosk. The rest of the assets are distributed as follows: Saimoni Shitemi ½ share of Nairobi Plot 1019; Andati Onjiro the whole of Butsotso/Bukura/876; Nelson Anunda the whole of Butsotso/Bukura/876 and Elphas Keya 6 acres of Butsotso/Shibeye/1536.
4. There is a consent, in Form 37, dated May 21, 2021, signed by Rose Isichi Evasiswa, Emily Judith Odera, Andati Onjiro and Nelson Anunda.



5. There is a response to the application by Julius Onjiro Mapesa, vide a notice of preliminary objection, dated November 8, 2021. He says that Emily Judith Odera is not an administratrix, and she has no capacity to mount the confirmation application, and, therefore, the same is a non-starter. He has also sworn an affidavit, on February 17, 2022. He says that not all the beneficiaries have consented to the distribution proposed, and the same has not been agreed upon. He says that the beneficiaries were not consulted.
6. The preliminary objection was struck out on November 10, 2021, on the basis that an order had been made on March 6, 2014, appointing the widows of the deceased administratrices of the estate, and directing Emily Judith Odera to apply for confirmation of the said grant.
7. Directions were given on February 21, 2022, for canvassing of the confirmation application, by way of written submissions. Only Julius Onjiro Mapesa filed written submissions. His principal argument is that the parties had not agreed on the distribution, and had not signed consents. He also submits that not all the assets of the estate have been brought on board, and cites Nairobi LR No 36/75/1, which he says is subject to ongoing litigation.
8. I agree with Julius Onjiro Mapesa, that the confirmation application on record does not have the support of a majority of the survivors and beneficiaries, to the extent that Form 37 has only been executed by a section of the family. Consequently, the court cannot deal with the matter under Rule 40(8) of the *Probate and Administration Rules*. The matter cannot be canvassed by way of written submissions either, as there is no consensus on distribution, nor has any of the parties filed the affidavits of protests envisaged in Rule 40(6) of the Probate and Administration Rules. The application shall be set down for hearing, where all the individuals, listed as beneficiaries in the affidavit of Emily Judith Odera of May 21, 2021, should be in attendance, so that the court can hear all of them, in compliance with Rule 41(1) of the Probate and Administration Rules.
9. For avoidance of doubt, Rules 40(6)(8) and 41(1) of the *Probate and Administration Rules* state as follows:
  - “40(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 37 against such confirmation stating the grounds of his objection.”
  - 40(8) “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.”
  - 41(1) “At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.”



10. As it is, I cannot confirm the grant without hearing the parties. Let the Deputy Registrar allocate the summons for confirmation of grant, dated May 21, 2021, a date for hearing, when all the beneficiaries should be in attendance, before the Judge, for hearing under Rule 41(1). It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24<sup>TH</sup> DAY OF MARCH, 2023**

**WM MUSYOKA**

**JUDGE**

Erick Zalo, Court Assistant.

Ms. Masakhwe, instructed by Gabriel Fwaya, Advocate for Emily Judith Odera.

Mr. Onindo, instructed by PC Onduso & Company, Advocates for Julius Onjiro Mapesa.

