In re Estate of Olengo Matete (Deceased) (Succession Cause 427 of 2007) [2023] KEHC 3502 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3502 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

SUCCESSION CAUSE 427 OF 2007

WM MUSYOKA, J

APRIL 28, 2023

JUDGMENT

1. The application for determination is dated 17th September 2012. It is an application for confirmation of grant, purported to be brought at the instance of Matete Were Musha, the administrator of the estate of the deceased herein. I shall refer to him hereafter as the applicant.

2. The affidavit, sworn in support, identifies Bunyala/Budonga/397, measuring 31 acres, as the asset that the deceased died possessed of, and, therefore, what is available for distribution. He proposes that the estate be shared out amongst the 7 sons as per the existing boundaries, allegedly put by the deceased before his demise. He proposes that the widows take life interest in the shares due to some of their respective sons, so that Anne Olengo takes in the share due to Matete Were Musha, Sania Olengo takes in the share due to Raphael Mushi, and Agnes Olengo takes in the share due to Joseph Machiva. It is also proposed that a surveyor should visit the land, to ascertain the actual sizes occupied by the 7 sons, as per the existing boundaries.

3. The application, dated 17th September 2012, attracted an affidavit of protest from Fiderol Castro Matete, sworn on an unknown date in 2012, but filed herein on 30th October 2012. He claims to have the authority of Mark Wechuli Olengo, Joseph Machiva and John Kennedy Matete to swear the affidavit. He avers that the deceased died a polygamist, having married 3 wives, being Ann Olengo, Sania Olengo and Agnes Olengo, who were all alive as at the date of the swearing of the affidavit. The deceased was said to have had 7 children, all sons, being the late William MacKinnon Matete, Matete Weramusia, the late Julius Sisa, Wechuli Olengo, Moses Metete, Raphael Musi and Joseph Machiva. After the demise of the deceased, the clan, Abaokho, sat, according to customary law, and shared out the land, whose total acreage he puts at 31.5 acres. The late William Mackinnon Matete got 5 acres, which was to be transferred to Fiderol Castro Matete; Matete Weramusia got 4 acres; the late Julius Sisa got 4 acres, to be transferred to Geoffrey Benard; Mark Wechuli Olengo got 4½ acres; Moses Matete got 4 acres, Raphael Musi got 4 acres; Joseph Machiva got 4 ½ acres; Ann Olengo got ½ acre, Sania Olengo got ½ acre, and Agnes Olengo got ½ acre. He states that there was no clear demarcation on the ground. He argues that the application was vague, and cannot be enforced. He avers that the applicant had not involved administrators from the other houses, who he proposes to be Matete Were, Mark

Wechuli Olengo and Joseph Machiva. He also asks that the applicant accounts for some Kshs. 300, 000.00, that he fraudulently obtained from Ann Olengo, and which formed part of the estate.

4. An order was made, on 5th June 2014, for a surveyor to visit the land, to ascertain actual occupation on the ground. That was done, and a surveyor's report, dated 12th November 2014, was filed herein on 14th May 2015. An affidavit was filed by the applicant, on 22nd March 2021, sworn on 22nd March 2021, to place that survey report on record.

5. The application was disposed of by way of oral evidence. The oral hearing happened on 22nd March 2021. The applicant, Matete Were Musha, was the first on the witness stand. He explained that 2 of the sons of the deceased had died, and were survived by widows and children. He named the widows of the late William Matete as Jane Najubia and Namusonge, and his children as Kennedy, Castro, Martin, Stephen, David and Paul. The widow of Julius Sisa was named as Celestine Nasambu, and his child as Geoffrey Bernard Matete. He asserted that the deceased had distributed the land during his lifetime, and proposed that the distribution by the court should be along those lines. He said that the deceased had daughters, who he named from each house. He said that some of the daughters were alive. He said that the first house, of Anne, had 5 daughters, who were all alive, and married. He conceded that he had not allocated anything to the daughters. He said that the deceased died in 1998, and that he was an adult then, and he had already set up his own home. He said that there was a family meeting to share out the land, there was agreement, but he chose to follow the instructions of the deceased. He said the late William was given land in 1969, but said that he, himself, was not present at that meeting, and the deceased was also not present. The other 6 sons were given their shares of the land in 1982. No minutes were taken, and no record was kept by the Chief or liguru on that..

6. Swaib Shikuku Mango followed. He said that the deceased was his uncle, and had shared his land amongst his children before he died. He could not tell when the deceased died, nor when he shared out his land amongst his children. He said that the deceased shared out the land among his 7 children. He said no government officials were present. He said that he was 20 years old, and was present, and dug the holes for affixing the boundary poles. He said that the sons were in occupation of the land allocated to them.

7. Cassim Namachi Makokha testified next. He stated that the deceased was his neighbour, and that he was present when the deceased distributed his property before he died. He said that that happened in 1990. He said that what was done was recorded, but he did not sign anything himself. He said that he knew that daughters of the deceased were entitled to land. He said that he did not know of any distribution in 1982, and that what he knew about was what happened in 1990. He said that the land was shared amongst 7 sons, and that he knew nothing about the daughters.

8. The case for the other side opened on 25th May 2022. Joseph Machiva Matete was the first to take the stand. He said that the deceased was his father, who had 3 wives, who he named. He said that 2 of the wives, Anne and Agnes, were still alive. He said that the deceased had sold a portion of his land, and a title deed was issued for the portion hived out. He said that he did not see anyone being given land by the deceased, and that it was after his death that the clan came and distributed the land. He said that he preferred that the land be shared out as per the distribution by the clan. He said that he could not recall the date when the clan sat, but said that there were minutes about the event, he stated that he utilized about 1½ acres. He said that there were no boundaries on the land. He stated that when the clan distributed the land, the applicant was absent, with the permission of the clan. He said that he was not aware then that the succession cause had been initiated, and that there was no court order allowing the clan to distribute the land.

9. Fiderol Castro Matete testified next. He was a grandson of the deceased, by virtue of being a son of his late son, William Mackinnon Matete. He said that he was not aware of any distribution of the land, and that he had built his house in the compound where his late father had set up a home. He supported the proposal to have the land shared out as per the distribution by the clan. He said that he attended the clan meeting in 2012. He said that his late father had told him that the land had not been distributed, and that his uncles would distribute it. He said that when the clan met to distribute the land, he was not aware of the instant succession proceedings. He said that the distribution by the clan gave his father a larger share as eldest son. He said that the deceased had shown his late father the dimensions of his land, but he did not know who showed the rest the portions of land that they occupied. He said that there were temporary boundaries. He said the elders used their own wisdom to allocate some sons 5 acres and other sons less than 2 acres. He asserted that the deceased had not distributed his land prior to his death.

10. I also heard John Kennedy Matete, a grandson of the deceased. He was not a witness of either of the 2 rival sides. He informed the court that he wished to be heard, and I heard him, in obedience to Rule 41(1) of the *Probate and Administration Rules*. He was one of the sons of the late William Mackinnon Matete. He said that the deceased had not distributed his property during his lifetime, and what he had done was to show the sons where to cultivate. He said that if there had been a distribution, then the land would have been demarcated. He asserted that the land belonged to the clan, and so distribution should be based on what the clan decided. He said that the late William was entitled to a larger piece of land as he had grown up children, and he could not share land equally with his brothers as some of them were younger than his sons.

11. At the close of the oral hearings, the protestor filed written submissions, which I have read through, and noted the arguments.

12. The matter is for confirmation of grant, which is provided for under section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. The confirmation process is about confirming the administrator to carry on with the process of administration, and to confirm the distribution proposals placed on record. The administrator is confirmed, by virtue of section 71(2)(a), if he had been properly appointed, and went about administering the estate in accordance with the law, and where it appeared that he would continue to administer the estate, upon confirmation, in accordance with the law. Distribution would be either in accordance with the law or based on what the parties have agreed upon. Where there is consensus amongst the beneficiaries on how they would like the estate distributed, then the court ought not concern itself with the distribution provided for under the law. Where there is no consensus, the court is bound to apply the law as it is. See Justus *Thiora Kiugu & 4 others v Joyce Nkatha Kiugu & another* [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and *In re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita, J).

13. The deceased died in 1998, after the *Law of Succession Act* had come into force on 1st July 1981. Consequently, the law applicable to distribution of the estate is the *Law of Succession Act*, by virtue of section 2(1) thereof. Secondly, he died intestate, the relevant provisions are in Part V, which govern intestate succession. Thirdly, he died a polygamist, and section 40 of the *Law of Succession Act* will govern the distribution.

14. The applicant was perpetuating this argument that the deceased had distributed his estate before he died, and that the court should distribute the estate according to that inter vivos distribution by the deceased. If the deceased had truly distributed his land before he died, there would be no need for the court to have these succession proceedings, for the estate would have been distributed inter vivos. Succession, in accordance with the *Law of Succession Act*, happens where there has been no inter vivos

distribution. This cause was initiated by the parties themselves, it was not imposed by the court, and the very fact of its filing is testimony that there was no inter vivos distribution. An inter vivos distribution would mean that the deceased caused his land to be subdivided, and new titles created and transferred or registered in the names of the children. That would mean the property would cease to be in the name of the deceased, and would be in the names of the children. It would mean that there would be no property in the name of the deceased, to be subjected to succession proceedings. See *Lucia Karimi Mwamba v Chomba Mwamba* [2020] eKLR (Gitari, J) and *In re Estate of Muchai Gachuika (Deceased)* [2019] eKLR (Gikonyo, J). Being shown where to build, or where to cultivate or graze cattle, without more, does not amount to inter vivos distribution. At best, it can only be an indication of an intention to distribute property during lifetime, which is not carried to fruition.

15. In this case, the estate asset, Bunyala/Budonga/397, is still in the name of the deceased. If it had been distributed, it would have ceased to exist as such. The fact that it is still in the name of the deceased is indicative of the fact that there was no inter vivos distribution by the deceased, as claimed by the applicant. If the deceased had intended to distribute the property inter vivos, he would have approached the relevant land control board, under the provisions of the *Land Control Act*, Cap 302, Laws of Kenya, and sought permission or consent of the Board, to subdivide and transfer the land to his sons. Upon obtaining that consent, he would have had a surveyor prepare a mutation for the purpose of subdivision. After the mutation of the land, he would then have had the subtitles created transferred and registered in the name of his sons, and title deeds issued. If nothing of that sort happened, during the lifetime of the deceased, then there was no inter vivos distribution.

16. The applicant has not led any evidence to demonstrate that the deceased had obtained consent of the relevant land control board, to have Bunyala/Budonga/397 subdivided, and the subdivisions registered in the names of the sons. If that had been done, then the principle that was stated in *In re Estate of Gedion Manthi Nzioka (Deceased)* [2015] eKLR (Nyamweya, J) would have applied, and the court would find that the land was distributed inter vivos. If some steps in that direction had been taken, but the deceased died before he had completed the exercise, the court would presume that there was an intention to have inter vivos distribution, which was frustrated by the death, and would honour what the deceased was trying to do. However, in this case, there is no iota of evidence that the deceased had attempted to obtain consent of the land control board to subdivide his land, and had in fact subdivided the land, but died before he could transfer the subtitles created to his sons. Consequently, no intention to distribute Bunyala/Budonga/397 was evinced by the deceased, and what emerges is that he had only shown the sons where to cultivate and put up houses. There was no intention to permanently distribute the land to them. If he had desired to do that, he would have either made a will, or obtained consent to subdivide the land, and gone ahead to do the subdivision. See *In re Estate of Phylis Muthoni M'Inoti (Deceased)* (2019) eKLR (Gikonyo, J), *In re Estate of Nyachieo Osindi (Deceased)* [2019] eKLR (Ougo, J) and *Lucia Karimi Mwamba v Chomba Mwamba* [2020] eKLR (Gitari, J).

17. The applicant is, no doubt, alive to the fact that there was no inter vivos distribution, hence the argument that distribution should be based on the way the property is occupied on the ground. It is this argument that drove the applicant to have a surveyor visit the land, for the purpose of ascertaining how Bunyala/Budonga/397 was occupied on the ground. Unfortunately, the law does not provide for distribution in intestacy based on how the land is occupied on the ground. For a person who died after the *Law of Succession Act* had come into force, the applicable law would be the provisions of Part V of the *Law of Succession Act*. For those who died before then, the applicable law would be customary law. Depending on whichever law applies, the intestacy estate is distributed in accordance with that law, and not how the land is occupied on the ground. The court has said, in *In Re Arusei* [2003] KLR 76 [2003] eKLR (Nambuye, J) and *Leah Chepkemei Kipyego v Mary Chesenge Kipyego* [2007] eKLR (F. Ochieng, J). However, based on the decisions in *Justus Thiora Kiugu & 4 others v Joyce Nkatha Kiugu &*

another [2015] eKLR (Visram, Koome & Otieno-Odek, JJA) and *In re Estate of Juma Shiro – Deceased* [2016] eKLR (Mwita, J), the court may still sanction a distribution based on actual occupancy on the ground, regardless of the acreages held by the individual survivors, so long as there is consensus on that mode of distribution. There is no consensus or unanimity here, and, therefore, the argument that the estate should be distributed as occupied does not hold water.

18. The protestor, on his part, says that the clan had sat the family down, after the deceased died, and had distributed the land. Let me start by saying that the land of a person dying after the 1st of July 1981, like the deceased herein, can only be distributed in succession proceedings initiated under the provisions of the *Law of Succession Act*. Distribution is by the court seized of the matter, and by no other entity, according to the *Law of Succession Act*. Any other entity getting itself involved in the matter, without leave of the court, would be intermeddling with the estate. See *In Re the Estate of Harrison Gachoki (Deceased)* [2005] eKLR (Okwengu, J), *M'Muriithi M'Mugambi v Harriet Kinya* [2007] eKLR (Ouko, J), *Re Estate of Alexander Mathenge Njeru (Deceased)* [2010] eKLR (Sergon, J), *Everline Atiang' Wanyama v William Osayo Siroko & another* [2014] eKLR (F. Tuiyott, J) and *Jane Wairimu Mathenge v Joseph Wachira Mathenge & 3 others* [2016] eKLR (Ngaah, J). In this case, the clan met and discussed about distribution of the estate herein, during the pendency of these proceedings, and that amounted to intermeddling, and whatever the clan decided was null and void, and bordered on criminality, in view of section 45(1) of the *Law of Succession Act*.

19. From the totality of what I have discussed so far, it should be plain that the distribution was not predetermined by the deceased nor by the clan, and Bunyala/Budonga/397 is available for distribution by the court, in terms of Part V of the *Law of Succession Act*.

20. However, before I venture to discuss distribution, I need to advert to the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules*. These provisions require the court to be satisfied that all the persons who are beneficially entitled to a share in the estate have been ascertained, and allocated their shares. This exercise is critical. It was stated, in *In the Matter of the Estate of Ephrahim Brian Kavai (Deceased)*, Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), that the proviso to section 71(2) is in mandatory terms, and from its wording, failure by the court to so satisfy itself renders the order of confirmation, and the resulting confirmed grant, illegal. It was emphasized that confirmation of grant in intestate succession is not a mere formality, but the most important aspect of intestate succession. See also *In re Estate of Benjamin Ng'ono Mbati (Deceased)* [2019] eKLR (Musyoka, J) and *In re Estate of Joseph Mubwabi Sabayi (Deceased)* [2021] eKLR (Musyoka, J). It was observed that hundreds of disputes would be avoided if the courts, faced with confirmation applications, properly performed their statutory duty under the proviso. I have to do my duty under the proviso to obviate endless disputes hereafter over distribution of this estate.

21. Have the parties hereto properly ascertained the persons who are beneficially entitled to a share in the estate herein? I do not think so. I will repeat, the deceased herein died in 1998. The *Law of Succession Act* came into force in 1981, 17 years prior. I repeat, the applicable law on distribution of this estate is Part V of the *Law of Succession Act*. Under that law, the estate is distributed amongst the children of the deceased. The word "children," as used in the *Law of Succession Act*, is gender neutral. It is not used to refer exclusively to the sons or the male children of the deceased, but rather the offspring of both gender, male and female, sons and daughters. The proceedings herein have been mounted in a manner that suggests that the deceased did not have daughters, and if he had any they did not matter. The letter from the Chief, dated 27th January 2007, only listed the 3 widows and 7 male individuals, whose relationship with the deceased is not disclosed. The individuals disclosed in the Chief's letter are the same persons listed in the petition filed herein on 27th May 2007. The summons for confirmation

of grant, dated 17th September 2012, proposes distribution to the 7 sons, with the widows taking life interest in the portions allocated to some of the sons. The protest, likewise, proposes a distribution to the 7 sons, with tokens to the widows. It emerged at the oral hearing that the deceased in fact had daughters. The first wife had 5 of them. There are at least 3 in the other houses. This was concealment of facts from the court, it amounted to misrepresentation, the grant was obtained on the basis of a lie, and there is fertile ground for revocation of the grant, or at least, not confirming the grant to the applicant, but to another more honest and straightforward individual, who would not mislead the court.

22. As the daughters of the deceased were not disclosed in the petition, and have not been provided for in the application for confirmation of grant, there has been no compliance with the proviso to section 71(2) and Rule 40(4). Going by the principle in In the Matter of the Estate of Ephrahim Brian Kavai (Deceased), Kakamega High Court Succession Cause Number 249 of 1992 (Waweru, J) (unreported), this application is premature, and the estate ought not be distributed, before the matter is brought into compliance with the proviso to section 71(2) and Rule 40(4).

23. Kenya is under a new constitutional dispensation, which frowns upon discrimination founded on gender, among others. Article 27 requires that women are to be treated equally with men in all spheres of life, including succession, and it outlaws discrimination based on gender. Article 2(4) of the *Constitution* renders any act which is discriminatory null and void. The daughters of the deceased in these proceedings have been treated in a discriminatory manner, by being excluded from these proceedings, and by being treated as if they were not children of the deceased. The very act of that exclusion renders these succession proceedings invalid, and any orders made in these confirmation proceedings, excluding the daughters of the deceased, would be discriminatory and invalid. It would be a waste of my time to go on to distribute the estate without the involvement of the daughters, for doing so would be sanctioning an unconstitutional position, and whatever order that I will make in the circumsnces would be invalid. See *In re Estate of M'Itunga M'Imbutu (Deceased)* [2018] eKLR (Gikonyo, J), *In re Estate of Stanley Mugambi M'Muketha (Deceased)* [2019] eKLR (Gikonyo, J) and *Wanjiru & 4 others v Kimani & 3 others* (Civil Appeal 36 of 2014) [2021] KECA 362 (KLR) (W Karanja, HA Omondi & Laibuta, JJA).

24. I feel I have said enough to demonstrate that it would be unsafe, unjust and unconstitutional to determine the application before me, before there is compliance with the proviso to section 71(2) and Rule 40(4). Section 71(2)(d) of the *Law of Succession Act* empowers the court to postpone a summons for confirmation of grant, to enable parties address any issues raised by the court. It would be ideal to do so in this case. However, I have been transferred from Kakamega, and, after I am done delivering this judgment, I will cease to be seized of this matter. Should I keep this application alive, by postponing it, and requiring the parties to do a number of things, to bring it into compliance with the proviso to section 71(2) and Rule 40(4), I would run the risk, thereafter, upon compliance by the parties, of having the file send after me wherever I will be in the Republic, to the prejudice of the parties. Regrettably, I shall not postpone it, which is the most logical thing, instead I shall have it struck out, to enable my successors be fully seized of the matter. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 28TH DAY OF APRIL 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Shivega, instructed by Victor Shivega & Company, Advocates for the applicant.

Mr. K'Ombwayo, instructed by M. Kiveu, Advocate for the protestor.