



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Saulo Koli Wambatsa (Deceased) (Succession Cause
173 of 2006) [2023] KEHC 3504 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3504 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 173 OF 2006**

WM MUSYOKA, J

APRIL 28, 2023

JUDGMENT

1. The deceased herein died on 3rd July 1992. A letter from the Assistant Chief of Matawa Sub-Location, dated 6th November 2006, is not helpful, for it does not indicate the persons who survived the deceased, instead it merely says that the family had settled on Charles Aura Omolo as administrator, and that the deceased had died possessed of South Wanga/Lureko/1075 and 1076.
2. The petition for representation was filed in this cause on 4th April 2006, by Charles Aura Omolo, in his capacity as a son of the deceased. He listed 1 individual as survivor of the deceased, being himself, Charles Aura Omolo. South Wanga/Lureko/1075 and 1076 is the property that the deceased is said to have died possessed of. Letters of administration intestate were duly made on 6th November 2006, and a grant was duly issued, dated 29th November 2006. The said administrator then filed a summons, dated 15th January 2007, for confirmation of grant, where he proposed that South Wanga/Lureko/1075 and 1076 devolve wholly upon himself. That summons was never heard.
3. On 23rd June 2008, a summons was lodged herein, dated 13th June 2008, for revocation of the said grant. It was at the instance of Mathlida Makokha Koli. She said that she was a widow of the deceased, with whom she had had 2 sons, named Vitalis Omolo Koli and Fredrick Aura Koli. She complained that, although the family had settled on Charles Aura Omolo as administrator, he had gone on to obtain representation to the estate, where he projected himself as the sole beneficiary, and using that grant he had caused the assets to be registered in his name. She asserted that Charles Aura Omolo had no entitlement to the estate. Charles Aura Omolo responded to the application, arguing that he had the consent of the family, including Mathlida Makokha Koli, to apply for representation, and that the land in question was ancestral land, which the deceased had held in trust for his brothers. That application was resolved by consent on 23rd February 2011, where the grant of 6th November 2006 was revoked, the assets reverted to the name of the deceased, and Charles Aura Omolo and Mathlida Makokha Koli were appointed joint administrators. Mathlida Makokha Koli was subsequently substituted by Vitalis Omolo Koli, by consent, on 21st January 2021, following her demise. I shall refer to Charles Aura Omolo and Vitalis Omolo Koli as administrators. Charles Aura Koli was directed, on 23rd February 2011, to file for confirmation of the joint grant.



4. What is up for determination is a summons for confirmation of grant, dated 20th July 2011. It is brought at the instance of Mathlida Makokha Koli. She expresses the deceased to have had been survived by 1 widow and 2 sons, being Mathlida Makokha Koli, Vitalis Omolo Koli and Fredrick Aura Koli. 2 assets are listed as what is available for distribution: South Wanga/Lureko/1075 and 1076. It is proposed that South Wanga/Lureko/1075 be devolved upon Vitalis Omolo Koli; and South Wanga/Lureko/1076 upon Fredrick Aura Koli. The application is not supported by a Form 37, on consent on distribution. Following the substitution of Mathlida Makokha Koli, as administratrix, by Vitalis Omolo Koli, I shall refer to the said Vitalis Omolo Koli, hereafter, as the applicant.
5. Charles Aura Omolo had earlier filed an affidavit on distribution, on 25th May 2011, sworn on even date. I shall refer to Charles Aura Omolo, hereafter, as the protestor. As his case is that the estate property herein is ancestral land, held in trust by the deceased, he has set out an elaborate family tree of the extended family of the deceased. He explains that the deceased herein was a son of one Isaiah Wambatsa Aura. The said Isaiah Wambatsa Aura had a brother called Alisio Omwolo Aura. Then he says that the said Isaiah Wambatsa Aura and Alisio Omwolo Aura were sons of Aura Mmasaba Omwolo. He identifies the sons of Isaiah Wambatsa Aura as Saul Koli Wambatsa, Luka Omoto Wambatsa and Philip Oduori Wambatsa, all of whom are deceased. The survivors of Saul Koli Wambatsa are said to be Mathlida Makokha Koli, Vitalis Omolo Koli and Fredrick Aura Koli. The survivors of Luka Omoto Wambatsa are said to be Melisa Wakhuyi Omoto, Stephen Isaiah Wambatsa, Zedekiah Wamunyolo Omoto, Elphas Opallah Omoto and Josephat Omumasaba Omoto. The survivors of Philip Oduori Wambatsa are said to be John Rakama Oduori, Joseph Omwolo Oduori and Joshua Mali Oduori. The survivors of Alisio Omwolo Aura are listed as Stephen Ongore Omwolo, Charles Aura Omolo and Peter Isaiah Omwolo. All these individuals are said to relate to the deceased as follows: Mathlida Makokha Koli widow, Vitalis Omolo Koli son, Fredrick Aura Koli son, Melisa Wekhuyi Omolo sister-in-law, Stephen Isaiah Wambatsa nephew, Zedekiah Wamunyolo Omoto nephew, Elphas Opallah Omoto nephew, Josephat Omumasaba Omoto nephew, John Rakama Oduori nephew, Joseph Omwolo Oduori nephew, Joshua Mali Oduori nephew, Stephen Ongore Omwolo cousin, Charles Aura Omolo cousin and Peter Isaiah Omwolo cousin.
6. He explains that South Wanga/Lureko/1075 and 1076 are subdivisions from South Wanga/Lureko/158, which had been registered in the name of the deceased at first registration, and which he held in trust for his brothers and the sons of Alisio Omwolo Aura. He avers that the children of both sides of the extended family, had utilized portions of the said land, since time immemorial. He avers that the deceased had subdivided South Wanga/Lureko/158 into South Wanga/Lureko/1075 and 1076, with a view of transferring South Wanga/Lureko/1076 to the family of Alisio Omwolo Aura, but he died before he could do so. He avers that the extended family had met on 3rd October 2001, and agreed on the shape of succession to the said assets, and the family of the deceased herein had always recognized the rights of the other sections of the extended family. He accuses the family of the deceased of having turned around, so that they can sell the property.
7. He proposes that South Wanga/Lureko/1075 be shared out between the families of the late Saul Koli Wambatsa, the late Luke Omoto Wambatsa and the late Philip Oduori Wambatsa, at 2.5 acres, 2 acres and 2 acres, respectively. He proposes that South Wanga/Lureko/1076 be devolved upon the family of the late Alisio Omwolo Aura, to be shared between Charles Aura 2.5 acres, Stephen Ongore Omwolo 2 acres and Peter Isaiah Omwolo 2 acres. He argues that his proposals are based on how the parties occupy the land on the ground.
8. Directions were given on 21st January 2021, for disposal of the application by way of oral evidence.



9. The oral hearings commenced on 28th April 2021. The applicant was the first on the witness stand. He stated that the deceased, his father, had subdivided South Wanga/Lureko/158 into South Wanga/Lureko/1075 and 1076, with the intent of transferring South Wanga/Lureko/1075 to him and South Wanga/Lureko/1076 to his brother, Fredrick Aura Koli. He stated that the estate should be shared out as per his proposals. He explained that Philip Oduori was his uncle, the owner of South Wanga/Lureko/268 and 277, and that Alisio Aura owned North Wanga/Lureko/278. He testified that there were Tribunal proceedings over the land, and the land was awarded to the deceased. He asserted that Charles was not from the immediate family of the deceased, and he was not entitled to a share in the estate of the deceased. He explained that the deceased had 2 parcels of land, being South Wanga/Lureko/158 and 280. He said that the family settled on South Wanga/Lureko/280, where the remains of the deceased were interred, and that he was the one working on South Wanga/Lureko/158. He said that Charles forced himself into South Wanga/Lureko/158 in 2000, after the deceased died. He said that his relatives from the extended family had their own parcels of land. He said that the original land registration was done in 1967, and no one came forward to claim South Wanga/Lureko/158 from the deceased.
10. Jonathan Mbatl Oronje followed. He was a neighbour to the parties, and his land, South Wanga/Lureko/130, was close to the estate. He said that South Wanga/Lureko/158 belonged to the deceased, adding that he never saw anyone else utilize it, except the deceased. He said that the protestor began to use the land after the deceased died. He explained that South Wanga/Lureko/158 belonged to the father of the deceased, and was registered in the name of the deceased during land adjudication. He said during the demarcation and adjudication exercises, in which he played some role, it was the deceased who was on the ground, and the property was registered in his name. He said that the other sons of the father of the deceased got other pieces of land elsewhere, and that South Wanga/Lureko/158 was meant for the deceased.
11. Jared Ndombera Oremba was next. The deceased was his uncle. He said that the deceased owned 2 pieces of land, South Wanga/Lureko/158 and another piece of land in Trans Nzoia. He said that no home had been established on South Wanga/Lureko/158 by the deceased. He also said that he was not aware whether any portion of the land had been sold to anyone. He said that the deceased was buried on another piece of land, where he had his home.
12. The next witness was Clement Waswa Chanoro. He was the area Chief. He explained that the deceased was survived by a widow and 2 children. He said that the deceased inherited South Wanga/Lureko/157 from his late father, but South Wanga/Lureko/158 was his own land. He said that no one settled on South Wanga/Lureko/158, and the same was utilized only for farming. He said that the siblings of the deceased had land elsewhere. He said a portion of South Wanga/Lureko/158 had been sold by Isaiah, to Mathias Anguyesi, and that person was in occupation. He said that he was the one who wrote a letter to enable the protestor obtain a death certificate. He said that he was not aware that the family had picked the protestor as administrator, and added that, in his understanding, the protestor was only leading the other members of the family, who were young. He said that the widow of the deceased was sickly and weak, and the protestor had offered to run errands. He said that South Wanga/Lureko/158 was not family land. He said that South Wanga/Lureko/158 belonged to the deceased, and that was why it was demarcated and registered in his favour. He said that the father of the protestor had land elsewhere.
13. The case for the protestor opened on 24th January 2022, when he testified. He described the deceased as his uncle, being the brother of his father. He said that South Wanga/Lureko/158 belonged to his grandfather. He said that his father and another uncle left South Wanga/Lureko/158 to the deceased, as administrator. He said that his father and his late uncle left their children on the land. He said



that by the time of their deaths, land reference numbers had not been given out. He asserted that South Wanga/Lureko/158 was registered in the name of the deceased as trustee. He said that he started using South Wanga/Lureko/158 at age 15 in 1968. He said that there were no structures on South Wanga/Lureko/158, and that the land was used only for tilling. He said that the Isaiah family occupied South Wanga/Lureko/1075, while the Alisio family occupied South Wanga/Lureko/1076. He said that the land, South Wanga/Lureko/158, was subdivided according to the houses. He said that when the deceased was ill, they had sat and agreed on the subdivision, and discussed succession to the estate of their late grandfather, but he died before that could be done. He said that they did not claim the land from 1968 as they had been utilizing it since then. He said land registration was done in 1967. He said that he was using the land of the deceased, going by the registration, and the title documents did not refer to a succession. He said that he attended the Tribunal proceedings and gave evidence. He said that he lived in North Wanga, while the family of the deceased was on South Wanga. He said that his late father had land at North Wanga, being North Wanga/Lureko/278. He stated that he and his brothers had their own land.

14. Dorcas Ombikhwa Kundende followed. She described the deceased as his elder brother. She said that the disputed land should not be availed only to the family of the deceased, as it was family land, used by all the families. He said that the land was farrow and used only for agriculture, as it was often covered by water during flooding of River Nzoia, and it was also infested by hippopotamuses. He said it was registered in the name of the deceased, as he was the eldest, and the other sons were small. She qualified that by saying that Philip, Kasamani and the deceased were each given their own land. She said that during the registration of the land in the name of the deceased, she was already married, and living in Nairobi with her husband. She said that she had never heard of the family of the protestor claiming land from the deceased.
15. At the close of the oral hearings, the parties filed written submissions, which I have read through and noted the arguments made.
16. The deceased died in 1992, after the *Law of Succession Act*, Cap 160, Laws of Kenya, had come into force. His estate is, therefore, for distribution in accordance with the *Law of Succession Act*. He died intestate, and, therefore, Part V, on intestacy, should apply to the distribution of the estate. Distribution would depend on whether he was survived by a widow and children. There is no dispute that his children are alive, but his widow, has since passed on. The protestor was not his child, but claims on behalf of his father's family, which claims that it is entitled to a portion of the land.
17. There is no dispute on who survived the deceased. He had a widow, who has since died. There are 2 sons who are still alive. No other children, say, daughters are being mentioned. I hope the deceased had no daughters, for if their existence is being concealed, then these proceedings, that we are conducting here, would be in violation of the Constitution, and should daughters come forward to complain about their exclusion, the proceedings would be rendered a nullity, by virtue of article 2(4) of the *Constitution*, and the parties will be forced to go back to square one. 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). Going by those who have been disclosed, then the deceased was survived by Vitalis Omolo Koli and Fredrick Aura Koli. These would be the persons entitled to share in the distribution.
18. What about the protestor and the extended family? The protestor claims that the property herein was trust property. If it is established that the said property was held in trust on behalf of his family and other families, then he and the others would be rightful heirs, and would be also entitled to share in the distribution.



19. Was the deceased holding the property in trust for the protestor and other members of the extended family? The property available for distribution is South Wanga/Lureko/1075 and 1076. Certificates of official searches have been placed on record, in respect of both titles, both dated 21st March 2006. The registration is in favour of the deceased, and there are no entries to effect that the title was being held in trust for anyone. There is no entry that the deceased was registered as administrator of the estate of his late father. No cautions, inhibitions, restrictions and encumbrances have been registered against the titles. South Wanga/Lureko/1075 and 1076 are subdivisions from South Wanga/Lureko/158. There is a green card on record for South Wanga/Lureko/158, it says so. I have perused it closely, I have not seen any entry which states that South Wanga/Lureko/158 was held by the deceased in trust for anyone. So, on the face of the registration documents, there is nothing that signifies that the estate assets were being held in trust by the deceased for members of his extended family.
20. From the documents placed on record, and the oral testimonies, it would appear that the siblings of the deceased also had assets registered in their names, at the same time as the deceased. I will only give an example with regard to the father of the protestor. The green card for South Wanga/Lureko/158 shows that it was registered in the name of the deceased on 9th January 1967, and it measured 13.8 acres. The green card for North Wanga/Mayoni/278 shows that it was registered in the name of the father of the protestor, Alisio Aura, on 24th November 1967. It measured 10 acres. These green cards suggest that the father of the protestor had land registered in his own name in 1967, at the same time when the deceased was getting South Wanga/Lureko/158 registered in his name. It would appear that the argument that South Wanga/Lureko/158 was registered in trust, for the father of the protestor, among others, because they were young, or unavailable, does not hold any water.
21. I was told about Tribunal proceedings over South Wanga/Lureko/1075 and 1076. I have seen the decision of the panel members of 30th April 2008. The Tribunal ordered that those parcels of land be transferred from the name of the protestor to the name of the mother of the applicant, Mathlida Makokha Koli. I doubt whether there is any utility to that decision. The Tribunal had no power, under the *Land Disputes Tribunals Act*, No. 18 of 1998, to make such orders. The Tribunal had no power to order cancellation of registration of titles, as cancellation of titles was the preserve of the Land registrar and the courts. Furthermore, I have no proof before me, that the said decision of the Tribunal was placed before a court, and adopted as a decree of the court, which I could then reckon.
22. The courts have repeatedly said that declaration of trusts, for that is what I am being invited to do here, is outside the purview of a probate court in succession proceedings. The proper thing should be to have the issue ventilated in separate proceedings. In *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), it was stated that succession proceedings are not the appropriate way to challenge title to assets said to comprise his estate, and that such assets, said to be the subject of a trust, in favour of the claimant, ought to be subjected to separate proceedings. The court further stated that the claimants have to prove the trust, and thereafter seek revocation of the title or partition thereof, which requires declaratory orders of the existence of the trust. It was emphasized that such is not the function of a succession cause, as succession proceedings are not appropriate for resolution of seriously contested claims around such matters as trust. The court then concluded that it had no jurisdiction to determine the claim of trust or to grant relief related to it.
23. In *Gichohi Mwangi v Simon Irungu Joshua* [2016] eKLR (Waweru, J), it was said that succession proceedings, by their very nature and design, under the *Law of Succession Act*, are very limited, with the aim of expeditious disposal, leading to due distribution of the estate of a deceased person. It was asserted that the mandate of a succession court is precise and limited; to determining the persons beneficially entitled to the estate of a deceased person, and their respective shares therein. There are



various formulas set out in the body of the statute to determine who such beneficiaries would be and their shares of the estate. It was stated that the *Law of Succession Act* and the *Probate and Administration Rules* do not envisage, at all, the adjudication, in succession proceedings, of potentially complex claims in land based on trusts, adverse possession, or contracts, without the benefit of proper and adequate pleadings, and without due regard to other laws, for instance the *Limitation of Actions Act* and the *Land Control Act*. Such claims belong in a civil court by properly instituted proceedings. It was noted that to allow such claims to be brought in succession proceedings, often many decades after periods of limitation have lapsed and without due regard to other laws, is to permit lawlessness by abuse of court process, allowing claims to fester for generations, and the same should not be permitted. On the facts of the case, it was held that the claims by the protestor clearly belonged in a civil court, and not in the limited succession proceedings. The court postponed the confirmation proceedings, to afford the protestor time to initiate a civil suit. See also *In re Estate of the Late Jonathan Kinyua Waititu (Deceased)* [2017] eKLR (Ndung'u, J), *Ruth Munyutha Kimonongi & another v Grace Waitibera Mutitu* [2015] eKLR (Ngaah, J), *In re Estate of James Muiruri Kamau (Deceased)* [2018] eKLR (Ndung'u, J), *In re Estate of Eliud Kiarie Mutembei (Deceased)* [2019] eKLR (Achode, J) and *In re Estate of Alfayo Ambalwa Musungu (Deceased)* [2020] eKLR (Musyoka, J).

24. There is also rule 41(3) of the *Probate and Administration Rules*, which state that where issues are raised at confirmation of a grant over such issues as ownership of a property that is placed before the probate court for distribution, and the confirmation proceedings are not the mode appropriate forum for determination of those issues or disputes, then the way out is to appropriate the disputed property, and postpone distribution of the affected assets to enable the parties initiate separate proceedings for determination on the question of ownership. That point was made in *Gichobi Mwangi v Simon Irungu Joshua* [2016] eKLR (Waweru, J).
25. For avoidance of doubt, rule 41(3) states as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the *Act*, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the *Civil Procedure Rules* and may thereupon, subject to the proviso to section 71(2) of the *Act*, proceed to confirm the grant.”
26. In *Pacific Frontier Seas Ltd v Kyengo & another* (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR) (M'Inoti, J Mohammed & Kantai, JJA), it was stated that there are disputes that arise in the context of a succession cause, which have to be resolved through the dedicated institutions or the specific mechanisms provided by the law for that purpose. It was pointed out that rule 41(3) of the *Probate and Administration Rules* contemplates situations where it is not possible or convenient to resolve disputes that arise in the course of determining an application for confirmation of a grant, such as identity of persons claiming to be beneficiaries, their share or estate, conditions or qualifications attaching to such share or estate among others. In such instances, the court is empowered, before confirming the grant, to postpone the confirmation to await determination of the question in proceedings under order 37 rule (1) of the *Civil Procedure Rules*. It was observed that it would not have been necessary to have rule 41(3) refer to order 37(1), if the succession court is entitled to deal with all and sundry issues that could arise in a succession cause. See *Naomi Wanjiku Waweru & another v Teresia Nyokabi Njuguna* [2015] eKLR (Musyoka, J), *In re the Estate of Karongi Chomba (Deceased)* [2018] eKLR (Muchemi, J), *In re Estate of Muraguri Murathu (Deceased)* [2019] eKLR (Ndung'u, J) and *Alex Waweru Kibura &*



2 others v Teresiah Nyokabi Njuguna [2019] eKLR (Maina, J). See also *In Re Njoroge Mbote* [2002] eKLR (Khamoni, J) and *In re Estate of Joseph Atang'o Akida alias Otango Achita (Deceased)* [2022] eKLR (Musyoka, J).

27. The declaration of a trust over immovable property amounts to determining a question on ownership or title to property. The *Constitution* of Kenya took away jurisdiction, in 2010, from the High Court, on such determinations. Article 162(2) of the *Constitution* provides for establishment of a court, of equal status with the High Court, to determine such issues, and such court was, indeed, created by the *Environment and Land Court Act*, No. 19 of 2011. Article 165(5) of the *Constitution* emphatically declares that the High Court has no jurisdiction to entertain any claim that falls with the jurisdiction of the court contemplated in article 162(2). So, if the *Constitution* declares that I, sitting as Judge of the High Court, have no jurisdiction on matters relating to ownership and title to land, how would I purport to make pronouncement on the status of South Wanga/Lureko/1075 and 1076, as to whether it was a property held in trust by the deceased, even when that arose in probate proceedings. I believe I have said enough, to demonstrate that the issue as to whether South Wanga/Lureko/1075 and 1076 was held in trust by the deceased, for the protestor, should not arise in these proceedings. If the protestor feels strongly, that a trust ought to be declared, then he should seek remedy elsewhere, in appropriate proceedings.
28. Of course, it is not lost on me, that the property, whose title is being challenged, was registered in 1967, and subdivided in 1991, before the deceased died in 1992. The protestor had all the time to initiate proceedings to have the interest that he claims in the said property determined. I do not see why he had to wait for succession proceedings to be initiated to raise it. It is not the appropriate forum for the reasons given above, and a succession cause is not a land case.
29. The orders that I am moved to make, in the circumstances, are as follows:
- a. That, for purposes of the confirmation application, dated 28th July 2011, I have identified the persons beneficially entitled to share in the intestate estate of the deceased as Vitalis Omolo Koli and Fredrick Aura Koli;
 - b. That South Wanga/Lureko/1075 shall devolve upon Vitalis Omolo Koli, and South Wanga/Lureko/1076 shall devolve upon Fredrick Aura Koli, absolutely;
 - c. That the grant herein is confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly; and
 - d. That, any party aggrieved by these orders, has leave of twenty-eight days, to move the Court of Appeal, appropriately.
30. It is so ordered.

JUDGMENT IS 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. Mwebi, instructed by CM Mwebi & Company, Advocates for the applicant.

Mr. Nyikuli, instructed by Nyikuli Shifwoka & Company, Advocates for the protestor.

