



REPUBLIC OF KENYA



**In re Estate of Wilson Omolo Oloo (Deceased) (Succession Cause 186 of 2009) [2023] KEHC 17883 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17883 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 186 OF 2009**

**PJO OTIENO, J**

**MAY 29, 2023**

**IN THE MATTER OF THE ESTATE OF WILSON OMOLO OLOO  
(DECEASED)**

**BETWEEN**

**YUNIA OGANGA OMOLO ..... PETITIONER**

**AND**

**CHRISTOPHER OWITI OMOLO ..... 1<sup>ST</sup> APPLICANT**

**FESTUS KUNGU OMOLO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOYCE ISANJILI ODARI ..... INTERESTED PARTY**

**RULING**

1. I am called upon to determine an affidavit of protest by Christopher Owiti Omolo Sunguti, Rose Namu, Joyce Isanjili Odari, Andrew Shikho Likare and Priscilla Indusa Matesi sworn July 18, 2022 against the summons for confirmation of grant.
2. Following the death of Wilson Omolo Oloo on June 17, 1976, Yunia Oganga Omolo petitioned this court for the issuance of grant of letters of administration intestate for his estate in which she listed the survivors of the deceased to be: -
  - a. Yunia Oganga Omolo-Widow
  - b. Christopher Owiti-Son
  - c. Joshua Aboma-Son
  - d. Jane Awiti-Daughter



- e. Festos Kungu-Son
  - f. John Onyango-Son
  - g. Ben Guda-Son
  - h. Rose Atieno-Daughter
3. The petitioner indicated the estate of the deceased to only be comprised in the property known as Land Parcel No. ISUKHA/KAMBIRI/60 measuring 11 acres. Following the said petition, a grant was issued on September 1, 2009, by which the petitioner was appointed as the sole administrator of the estate.
  4. The grant was later revoked and Christopher Owiti Amolo and Festus Kungu Omolo were appointed as administrators of the estate of the deceased vide a grant issued on September 26, 2019. Thereafter, the two filed summons for confirmation of grant dated May 18, 2020 in which they indicated that the deceased was survived by only three children namely; i) Christopher Owiti Omolo ii) Festus Kungu Omolo and; iii) Joshua Aboma Omolo. That position is reiterated in the further affidavits in support of the summons for confirmation of grant sworn by Christopher Owiti Omolo in which he asserts that the deceased had two wives and from the first house he was the only child while the second house had two children namely Festus Kungu Omolo and Joshua Aboma Omolo. He also stated that prior to his death, the deceased had allocated 5 acres of his estate to the first house and 8 acres to the second house and that the two portions were distinctly marked with a boundary created in 1972 before the deceased dies in 1976. He then confesses that he later sold the portion of 5 acres to the interested party and relocated to the then Homa Bay district, where his mother was buried. He thus lays no claim on the estate save for the five acres he proposes be given to the purchaser while the rest go to the children of the second house to share equally.
  5. However, the second administrator also swore a further affidavit in which there is a disclosure that the deceased indeed was polygamous and left behind twelve children, four from the 1<sup>st</sup> house and eight from the 2<sup>nd</sup> house, some of whom have since died then proposes that the estate be distributed by giving to the girls half an acre each while the boys get one acre each. The affidavit further contends that of the four dead sons, three are survived by children who then should get shares on account of the parents. It was asserted that one Julius Hosea Omolo died without leaving behind any widow or child and that the child named as Peter Otieno, is actually a son to Festus Kungu Omolo.
  6. The position of the two seem more influenced by the erroneous and unlawful notion that only sons are children, or more children than girls, for purposes of succession. That is a position that must be discouraged and holders of such notions told that such is wholly untenable.
  7. The affidavit of protest by Christopher Owiti Omolo Sunguti, Rose Namu, Joyce Isanjili Odari, Andrew Shikho Likare and Priscilla Indusa Matesi reiterate what the protestor asserts and lists the following as the beneficiaries of the estate of the deceased: -
    - 1<sup>st</sup> House
    - Nerea Kuro Omolo-Widow and deceased
    - Christopher Awiti- son
    - Selfa Auma – daughter and deceased
    - Rael Aoko –daughter and deceased
    - Rose Namu- daughter



2<sup>nd</sup> House

Yunia Oganga Omolo-Wife

Andrea Angong'a-Deceased

Joshua Aboma

Isaac Olonde

Benjamin Guda

Charles Laro-Deceased

Jane Awiti Omollo

Rose Atieno Omolo

Festo Kungu

8. The protestors state that following the death of the deceased, they sold the five (5) acre allocated to the 1<sup>st</sup> house which they used to treat the 1<sup>st</sup> wife who was ailing and the balance of the purchase price therefrom was employed to buy a parcel land in South Nyanza where the first wife established a home and was subsequently buried. The 2<sup>nd</sup> house remained on their portion of land as apportioned by the deceased and live there to date.
9. In the several affidavits sworn by Rose Atieno Adhiambo, Jane Awiti Omollo and Festus Kungu Omolo all sworn on November 22, 2022, the three dispute the allegation that the deceased distributed his estate between the two houses before his demise admit that some five acres were sold to the interested party but assert that the sale was invalid for having been done without the authority of the court.

#### **Issues for determination**

10. After reading the petition, the summons for confirmation of grant, the affidavit of protest and the subsequent other affidavits, this court identifies the following issues for determination: -
  - a. Whether the 5 acre sold by 1<sup>st</sup> house forms part of the estate?
  - b. How should the estate of the deceased be distributed?

#### **Analysis**

##### **Whether the 5 acre sold by 1st house forms part of the estate**

11. As per his death certificate, the deceased died on the June 17, 1976. The 1<sup>st</sup> house through Christopher Owiti Omollo sold a share of the estate, that is 5 acres, to one Timothy Odari on the September 22, 1983. This court first issued a grant of letters of administration of the estate of the deceased to Yunia Oganga Omolo on September 1, 2009. At the time of the sale, Christopher Owiti Omollo did not have the authority to dispose the 5-acre piece or indeed any portion of land since the property of a deceased could only vest in a duly appointed personal representatives. By that sale, both parties to it were clearly intermeddling with the state in contravention of sections 45, 79 and 82 of the Law of Succession.



12. In *re Estate of Jamin Inyanda Kadambi (Deceased) [2021] eKLR* the court while addressing such a scenario observed and stated that;

' A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the *Law of Succession Act*. Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the *Law of Succession Act*, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.'

13. This position was reiterated in *Morris Mwiti Mburungu –vs- Denis Kimathi M'Mburungu [2016] eKLR* where the court held as follows: -

' .... Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of section 45 and 82 of the Act that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of innocent beneficiaries who may have been affected by the act but were not involved in the same.'

14. Flowing from that very clearly entrenched position of the law, it is the finding of the court that the sale to the interested party was contra statute and incapable of recognition nor enforcement by the court by an order in favour of the interested party. The consequence is that the property remains that of the deceased and must be availed and distributed to the persons entitled as beneficiaries.

### **How should the estate of the deceased be distributed?**

15. On the face of it, the summons for confirmation of grant fails to capture all the beneficiaries of the estate of the deceased, who have however been introduced by the protesters. It is however not clear whether the second house had 8, 9 or 10 children. It is difficult because while the joint affidavit of the protesters identifies 8 children, the further affidavit by the second administrator identify nine children while in another further affidavit sworn on November 22, 2022 ten children are enumerated. What is clear beyond dispute is however that the first house sold what they considered theirs to the interested party, moved out of the deceased land and settled elsewhere and are not claiming any additional shares in the estate. That the sale, to a neighbour, was never protested to by the 2<sup>nd</sup> house for a period in excess of thirty years demonstrates to court that the second family considered the portion sold to belong rightfully to the first house and not them. It equally aligns with the protesters position that the first house was given by the deceased five acres which was then curved out and demarcated by a boundary. The court thus determines that the deceased had expressed a wish that the estate be shared between the two houses by the 1<sup>st</sup> house getting five acres while the second getting the balance of the land. Such a wish ought to be respected and enforced unless it disclosed an unfair or discriminative inheritance.
16. In the circumstances and facts disclosed in this case, the court considers the wishes of the deceased to adhere to the principle of equal sharing while using the two houses as the basic units of sharing. It is therefore determined that the estate be shared by allocating the five acres admitted to have been unlawfully sold by the first house to the interested party while the remainder of the land shall go to the 2<sup>nd</sup> house. The member of each house shall share their portion equally among all unless one opts



to renounce. The interested party whose interest is not challenged by the 1<sup>st</sup> house may then concur with members of that house on how the land gets transferred.

17. Because the court is unclear on who are the exact beneficiaries and who among the deceased beneficiaries left behind which children, it is directed that parties shall within 21 days from the date of this judgment file affidavits to set out the beneficiaries from each house.

### **Rendition And Final Orders**

18. Accordingly, for the reasons set out above, this court makes the following orders: -
- a. The summons for confirmation of grant dated May 18, 2020 are hereby dismissed.
  - b. Christopher Owiti Omolo and Festus Kungu Omolo are hereby directed to file fresh summons for confirmation of grant within 45 days from the date of this ruling capturing all the children of the deceased including those that are deceased. For those that are deceased, the administrators shall capture the spouse and/or children of the deceased beneficiaries.
  - c. The mode of distribution to be captured in the summons to include the entire estate of the deceased being 11 acres.
  - d. The district land surveyor to visit the land, file a report, within 60 days, on who currently occupies Land Parcel No Isukha/Kambiri/60, in what portions and whether there are any structures erected thereon.
  - e. This being a family matter I make no order as to costs.
  - f. Mention on October 16, 2023.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29<sup>TH</sup> DAY OF MAY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Ms. Morara for Mbeche for the Petitioner

No appearance for Mukavale for the Objector

No appearance for Munyendo for the Interested Party

Court Assistant: Polycap

