



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Sebastian Mahanjabu Omondi (Deceased) (Succession Cause 64 of 2006) [2023] KEHC 18085 (KLR) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 64 OF 2006**

WM MUSYOKA, J

MAY 26, 2023

RULING

1. The application, the subject of this ruling, is the summons, dated March 9, 2022. It seeks confirmation of a grant made herein on December 14, 2021, to Albertus Wabwire Anyango and Margaret Rose Cynthia, who I shall refer to hereafter, corporately, as the administrators. The application is brought at the instance of Margaret Rose Cynthia, who I shall refer hereto after as the applicant.
2. According the affidavit that the applicant swore in support, on March 9, 2022, the deceased was survived by 4 individuals, being 1 widow, Margaret Rose Cynthia, and 3 sons, being Martin Spencer Omondi, Kevin Ngaywa Ojiambo and Amos George Ojiambo. 1 asset is disclosed as what the deceased died possessed of, being Bukhayo/Matayos/1924, which has since been subdivided into Bukhayo/Matayos/5772 and 5773. It is proposed that the estate be shared between the 1 widow, the 3 sons, and the other administrator, Albertus Wabwire Anyango, in the following terms: Margaret Rose Cynthia – 2.7 Ha, Martin Spencer Omondi – 1.4 Ha, Kevin Ngaywa Ojiambo – 0.4 Ha, Amos George Ojiambo – 0.4 Ha and Albertus Wabwire Anyango – 0.8 Ha.
3. Albertus Wabwire Anyango swore an affidavit on March 16, 2022. I shall refer to him hereafter as the protestor. He avers that the deceased was his brother. He explains that the land originally was Bukhayo/Matayos/223, and originally belonged to their father. He says that the deceased herein, that is his late brother, sold 2 acres out of Bukhayo/Matayos/223, and that title, Bukhayo/Matayos/223, was closed on subdivision, and new titles and parcels were created, being Bukhayo/Matayos/1924 and 1925. He explains that Bukhayo/Matayos/1924 was occupied by his family and that of the deceased. He occupies 4.5 acres, while the family of the deceased occupies the other 6.5 acres. He protests that the portion given to him was too small, and urges that the property be shared on the basis of the manner it is occupied on the ground, 4.5 acres by him and 6.5 acres by the family of the deceased.
4. The protest attracted a response from the applicant, vide an affidavit that she swore on May 31, 2022. She explains that the father of the protestor and the deceased had 2 wives, and that the mother of the deceased was the first wife, while the mother of the protestor was the second wife. The father of the protestor and the deceased had distributed his estate among the 2 houses, so that the first house, where the deceased belonged, got Bukhayo/Matayos/223; while the second house, where the protestor



belonged, got Bukhayo/Matayos/222. She explains that both families, the first and second houses, used to live in the same compound, presumably on Bukhayo/Matayos/223, for she avers that after the sharing by the late father of the deceased and the protestor, the mother of the protestor moved with her children to Bukhayo/Matayos/222, but the protestor refused to follow them. She states that the deceased herein sold a portion of Bukhayo/Matayos/223 to Abdala Ngashe Onyango, and the portion was subdivided into Bukhayo/Matayos/1974, which was registered in the name of the deceased, and Bukhayo/Matayos/1975, which was registered in the name of Abdala Ngashe Onyango. She says that the protestor had petitioned for representation to the estate of the deceased, without involving her as widow of the deceased, and proceeded to subdivide Bukhayo/Matayos/1974, between himself, Leonard John Barasa and Martin Spencer Omondi. She complains that after that the protestor put up a permanent house on the land, and that it was for that reason that she was proposing that he gets 2 acres of Bukhayo/Matayos/1974, as he cannot transfer or shift his house from Bukhayo/Matayos/1974. She asserts that his share is in Bukhayo/Matayos/222. She states that Leonard John Barasa was a relative.

5. The applicant has attached a number of documents to support her case. There is a green card for Bukhayo/Matayos/222. It shows that it was originally registered in the name of Oncrati Odhiambo on June 23, 1971. On August 23, 1981, it was transferred to the protestor as a gift. The title closed in 1989, after it was subdivided, into Bukhayo/Matayos/6045, 6046, 6047 and 6048. The green card for Bukhayo/Matayos/223 shows that it was registered in the name of the deceased herein on June 23, 1971. The title closed on September 22, 1992, upon subdivision into Bukhayo/Matayos/1974 and 1975.
6. Directions were given on May 5, 2022, for canvassing of the confirmation application by way of written submissions. Both sides complied with those directions, by filing their respective written submissions, which I have read through, and noted the arguments made.
7. The nature of the protest, in my humble view, should have necessitated the hearing of the confirmation application orally, where all the issues flagged would have been thoroughly trashed out. The issues flagged herein are in the nature of a claim that Bukhayo/Matayos/223 was held by the deceased in resulting trust for the protestor. Such issues ought not be resolved by merely looking at averments in an affidavit, an oral hearing ought to be conducted. More fundamentally, the courts have held that a question as to whether land is held in trust ought not be determined within the context of a probate cause by a probate court, for the probate cause is designed for the purpose of distributing undisputed assets of the deceased. Where a dispute exists or arises on ownership of an asset said to comprise the estate of a dead person, then that ought to be escalated to the civil or land court, for determination of the question of ownership, after which, depending on whether the property is found to belong to the deceased, the same is placed before the probate court for distribution. The probate court is not a land court, and the probate cause is not a land case, where issues around title or ownership of land, and related issues, such as trusts over the land, can be resolved. See *In re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim, J), *In re Estate of Julius Wachira (Deceased)* [2013] eKLR (Musyoka, J) and *In re Estate of Mwangi Gikonyo* [2017] eKLR (Waweru, J). The protestor would have been better off in another court, where he would have filed a proper suit, against the estate of the deceased herein, for determination of the question as to whether the deceased held Bukhayo/Matayos/223 in resulting trust.
8. Rule 41(3) of the *Probate and Administration Rules* enables the probate court to appropriate or set aside an asset whose ownership is disputed in a confirmation application, or where issues of trust are



raised, and either proceed to distribute what is not disputed, or to keep the confirmation application in abeyance pending resolution of that question. For avoidance of doubt, rule 41(3) states as follows:

“Hearing of application for confirmation 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.

9. Should I appropriate Bukhayo/Matayos/223 to await determination of the question on ownership of the said property or whether there was a resulting trust? I note that the applicant raised new issues, and presented facts to support them, in her affidavit in response. She stated that the father of the deceased and the protestor had 2 parcels of land, which he had given out to his 2 houses. She has exhibited documents to support that. Bukhayo/Matayos/223 was given to the deceased, for the first house, and measured 5.4 hectares; while Bukhayo/Matayos/222 was given to the protestor, for the second house, and measured 4.4 hectares. The green cards placed on record indicate that Bukhayo/Matayos/223 was registered in the name of the deceased, and Bukhayo/Matayos/222 was registered in the name of the protestor. The protestor did not file an affidavit in response to that affidavit, and, therefore, the facts deposed to in it are not controverted or contested. I shall take it that that is the true position, and there would be no reason for Bukhayo/Matayos/223 to be set aside, to allow the protestor move another court to determine the question.
10. In view of what I have stated above, it is my conclusion that the father of the protestor and the deceased had shared out his property to the deceased and the protestor. Each got their share, and the protestor is not entitled to get a share of Bukhayo/Matayos/223 at all. However, as the applicant is willing to give him 2 acres, for the reasons that she has given, and as Bukhayo/Matayos/222 appears to be smaller than Bukhayo/Matayos/223, by 1.0 hectare, I shall go by the proposal by the applicant.
11. However, before I make final orders, I need to ensure that I fully comply with what the Constitution requires of me. The proviso to section 71(2) of the Law of Succession Act, cap 160, Laws of Kenya, and rule 40(4) of the Probate and Administration Rules, require me to be satisfied that the administrators have ascertained all the persons beneficially entitled to a share in the estate herein. The applicant disclosed a widow and sons. In most Kenyan communities, daughters do not count in succession matters, a notion based on customary law, yet the Constitution and the Law of Succession Act require that they be treated equally with the sons. Failure to comply with the constitutional dictate, in article 27 of the Constitution of Kenya, 2010, renders any order that the court makes, on distribution of an estate, which excludes daughters, null and void, by virtue of article 2(4) of the Constitution. I do not wish to labour in vain. Let the applicant disclose whether the deceased had daughters, and, if he did, let their names be disclosed, by way of a further affidavit. I shall give further directions thereafter. 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).

Table

12. For avoidance of doubt, the relevant portions of articles 2 and 27 of the Constitution state, as follows:

“2 Supremacy of this Constitution



- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2)
- (3)
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (5)

27 Equality and freedom from discrimination

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

13. The matter shall be mentioned, for compliance, on a date to be given at the delivery of this ruling.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 26TH DAY OF MAY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Juma, instructed by JV Juma & Company, Advocates for the applicant.

Mr. Otanga, instructed by Bogonko Otanga & Company, Advocates for the protestor.

SUCCESSION CAUSE NO. 64 OF 2006 – RULING 2

