



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Opamo Wangira Masakhwe (Deceased) (Succession Cause 91 of 2011) [2023] KEHC 22774 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 91 OF 2011  
WM MUSYOKA, J  
SEPTEMBER 28, 2023**

**RULING**

1. I am tasked with determining a summons for confirmation of grant, dated December 7, 2021, which is brought at the instance of Jacob Babu Okumu. I shall refer to him hereafter as the applicant. He swore an affidavit on December 7, 2021. He avers that the grant was made on November 24, 2021, to him and Fredrick Tusker Opamo, as co-administrators. He avers that the asset of the estate, for distribution, is Bunyala/Bulemia/149. He states that the persons entitled to that parcel of land were the deceased herein, and his brothers Okumu and Kona, who he describes as part-owners. He describes Bunyala/Bulemia/149 as ancestral land, to which the 3 brothers were entitled. He identifies the 3 as Okumu Masakhwe Fufu, Kona Masakhwe Fufu and Opamo Wangira Masakhwe. He goes on to identify the survivors of the 3, being 17 in total. He proposes distribution of Bunyala/Bulemia/149, amongst 13 of the 17 survivors of the 3 brothers, unevenly, with portions ranging between 0.4 and 0.8 hectare.
2. The co-administrator, Fredrick Tusker Opamo, protested. He swore his affidavit on January 24, 2022. I shall refer to him as the protestor. He is a son of the deceased herein, Opamo Wangira. He avers that Bunyala/Bulemia/149 was meant for 2 individuals, his father, Opamo Wangira Masakhwe, and his uncle, Okumu Masakhwe, both of whom were entitled to equal shares. He states that the applicant was introducing into the matter individuals who were not related to the deceased. He asserts that Bunyala/Bulemia/149 should be shared out amongst only 4 individuals, being Willimina Otiato Atieno, Justus Barasa Ouma, Fredrick Tusker Opamo and Peter Xavier Ndindi Ojiambo. He avers that these proceedings relate to the estate of Opamo Wangira Masakhwe, and only the portion due to his estate ought to be shared, while that due to Okumu Masakhwe ought to be distributed in separate proceedings.
3. The applicant swore a further affidavit, on March 31, 2022. He avers that the succession proceedings were intended to be amended to include all the survivors of the 3 brothers. He states that the deceased herein had made a statement, before he died, on how the land, Bunyala/Bulemia/149, was to be shared out between him, and his 2 late brothers. He further avers that the area Chief had written to the court, listing all the bona fide heirs to the estate herein. He asserts that Bunyala/Bulemia/149 was ancestral land, belonging to the 3 brothers, and which emanated from their father, Masakhwe Fufu.



- He states that the protestor had signed a document, dated January 11, 2017, accepting that Bunyala/Bulemia/149 belonged to the 3 brothers. He states that the persons listed as heirs by the protestor, Willimina Otiato Atieno, Justus Barasa Ouma and Peter Xavier Ndindi Ojiambo, were actually persons that the protestor had sold portions of the land, and not creditors of the deceased. He accuses the protestor of seeking to defraud the estate. He also accuses him of discriminating against his own mother and sisters, on the guise that they were women, who were not entitled to a share. He proposes that family members be allowed to retain the lands that they occupy, and that the purported buyers provide proof that they bought the land.
4. Another protest was lodged in the matter on June 13, 2022, by Mary Nyongesa Wangwe, Margaret Nabwire Okumu, Josephat Juma Kona, Michael Silas Okumu, William Tabu Okumu, Fejenia Ngira Kona, Silvanus Were Okumu, Topister Agola Okumu and Wilfred Ochieng Okumu. Their affidavit was sworn on even date. They claim to be widows and children of the 3 brothers, Okumu, Kona and Opama. They assert that Bunyala/Bulemia/149 is ancestral land, but registered in the names of 2 of them as trustees. They express support for the agreement stated in the document dated 11<sup>th</sup> January 2017, signed by the applicant, the protestor and Kona Masakhwe Fufu. They accuse the protestor of refusing to cooperate with the other family members, and of intending to defraud the estate. They also assert that the deceased herein did not leave behind any debts, and that Willimina Otiato Atieno, Justus Barasa Ouma and Peter Xavier Ndindi Ojiambo were not creditors of the estate.
  5. Michael Masiga Oliacha swore an affidavit on October 22, 2022. He is a relative of the parties, and had chaired a meeting meant to reconcile them. He said that the 3 persons named as brothers were, indeed, blood brothers, who lived on Bunyala/Bulemia/149. He states that the summons for confirmation of grant lists all the person beneficially entitled to a share in the estate, as Bunyala/Bulemia/149 was ancestral land, to which all 3 were entitled. He accuses the protestor of trying to defraud a section of the family, particularly the house of Kona Masakhwe. He states that he chaired a family meeting on July 25, 2022, where it was agreed that Bunyala/Bulemia/149 be shared out as per the distribution by Okumu Masakhwe Fufu, that Bunyala/Bulemia/149 belonged to the 3 brothers Okumu Kona and Opamo, the illegal land buyers be excluded from the distribution, and that the deceased herein had not left any liabilities. He asserts that the 1<sup>st</sup> protestor was a young person who was talking about family land issues that he did not quite understand.
  6. The protest, dated June 13, 2022, was withdrawn, vide a notice filed herein on October 31, 2022. It was substituted with a reply to the protest by the protestor, vide an affidavit sworn on October 22, 2022, filed herein on October 31, 2022. The contents of the affidavit of October 22, 2022 are largely word for word those in the affidavit of 1 June 3, 2022, withdrawn on even date.
  7. The matter was disposed of by way of viva voce evidence, following directions given on March 15, 2023.
  8. The applicant was the first to testify, on May 16, 2023. He explained that Bunyala/Bulemia/149 was meant for the 3 brothers, even though it was registered in the names of 2 of them. He stated that the third brother was away at the time the registration was done in the names of the other 2. He said that all 3 are dead, and their remains were interred on Bunyala/Bulemia/149. He said that the search certificate on Bunyala/Bulemia/149 did not indicate that the 2 registered proprietors held the land equally, or in what portions or percentages. He asserted that the 2 held the land in trust for their brother. He stated that the 3 families occupied the land on the ground, and the occupancies are demarcated. He stated that he had provided for all 3 families, but the protestor had not. He referred to the agreement of January 11, 2017, with the protestor and another, where it was agreed that everyone would be catered for. He asserted that the protestor had also signed that agreement. He stated that the family had sat, as directed by Karanjah J, and had agreed, including the protestor, on distribution.



9. During cross-examination, he was shown a green card for Bunyala/Bulemia/149, and he conceded that it showed that Bunyala/Bulemia/149 was held at ½ shares between the deceased and the other co-proprietor. He said that he had come to court to protest in the instant proceedings, and was made a co-administrator. He mentioned that he had initiated succession proceedings in respect of the estate of his father, being Busia HCSC No. E530 of 2021, while there was another cause in the estate of Kona Masakhwe in Busia HCSC No. E531 of 2021. He said that those other proceedings were withdrawn, and he and the family of Kona Masakhwe joined the instant proceedings. He said that he was aware that in respect of co-ownership, the estates of the co-owners ought to initiate separate succession causes. He conceded that on paper, the protestor's family was entitled to ½ share in Bunyala/Bulemia/149. He said that the 3 brothers had shared out the land in 1970/71, unevenly between themselves, and he assumed that his father got 1/3 of it. He said that there were sisal boundaries. He said Kona Masakhwe was in Uganda during land demarcation and adjudication, and came back after the coup in 1971, and his brothers gave him his share. He said that he was not aware that the claim should be handled by another court.
10. The protestor testified next. He said that Bunyala/Bulemia/149 was registered in the name of his father and the father of the applicant, the late Okumu, with each having a ½ share. He said that his father was entitled to 3.6 hectares out of Bunyala/Bulemia/149, and that was what he was proposing to distribute. He said that he had 2 sisters, Maria and Monica, and conceded that he had not involved them in the succession process. He explained that they had said that they were married, and did not wish to be involved in the matter. He asserted that Bunyala/Bulemia/149 was for 2 people, and that Kona Masakhwe owned land separately, being Bunyala/Bulemia/6990. He stated that Bunyala/Bulemia/149 did not have boundaries, and it was only after his father died that Okumu demarcated the land. He asserted that the persons who were seeking to distribute the property were not children of the deceased. He conceded to signing the agreement of 11<sup>th</sup> January 2017, saying that he understood it to entitle him to ½ share, and that he denounced it thereafter after establishing that that was not the case.
11. During cross-examination, he stated that he signed another agreement on May 2, 2016. He, however, explained that that agreement did not deal with how Bunyala/Bulemia/149 was to be distributed, and that it alleged that the late Okumu had left a will, which was not true. He stated that he signed the agreement dated January 11, 2017. He conceded that the families of the 3 brothers occupied Bunyala/Bulemia/149, and after Kona died he was buried on Bunyala/Bulemia/149. He said the family of Kona occupied a portion of the land given to it by Okumu. He said that he had not catered for his sisters, as they were married, and were settled, and were not objecting. When shown the affidavit of October 22, 2022, he conceded that they were objecting to their exclusion. He explained that he did not object to the widow of Kona being buried on Bunyala/Bulemia/149, as she was buried on the side of Okumu. He stated that Willimina Otiato bought land from him, and that Peter and Justus were also buyers from him. He said that he sold the land before the succession cause was filed, to raise money for the succession cause. He said that he had no authority from the court to sell. He said that Ndindi Ojiambo bought a portion from him, after the filing of the succession cause. He said that he sold the land to buyers on the side meant for his father. He said that he did not know the history of Bunyala/Bulemia/149, in terms of whether it was ancestral land, or land that the proprietors had bought. He said that he did not know whether Bunyala/Bulemia/149 had been inherited from his grandfather, Masakhwe Fufu. He stated that during land demarcation and adjudication, Kona Masakhwe was in Uganda, adding that it was possible that he was added to the land after he came back. He stated that he attended the meeting ordered by the court, but he did not agree with the resolutions, as the other participants wanted to distribute the land according to the wishes of Okumu. He said that he awarded the family of Kona 1 acre, as they were in occupation. He said that he did not support the proposals by the applicant. He stated that Masiga was a relative, who called a family meeting, but he did not agree with the minutes



placed before the court, as they were done behind his back. He said that he attended the meeting, but he did not sign the minutes, as he did not agree with what was discussed.

12. At the close of the oral hearings, both sides filed written submissions, which I have read through, and noted the arguments made.
13. The proceedings herein relate to the estate of Opamo Wangira Masakhwe, who is a co-owner of Bunyala/Bulemia/149. The protestor is his son, while the applicant is not. The applicant is asserting inheritance rights to the estate of the deceased herein, yet he is not a survivor of the deceased herein. He can only assert rights to the estate of his own father, and not to that of his uncle. The estate of the deceased herein is entitled to ½ share of Bunyala/Bulemia/149, and that is the share that ought to be in contention herein. I see that that is what the protestor is contending, and his contention is in keeping with the law. The applicant should have initiated a succession cause in the name of his father, to distribute the other ½ share of Bunyala/Bulemia/149 due to his father. By asserting his inheritance rights in this cause, he is pushing to have his father's estate distributed within the estate of his late uncle, which is not acceptable or permissible. There can only be one succession in one succession cause. It is not acceptable or permissible that in one succession cause estates of 2 or 3 or more individuals are distributed.
14. The property sought to be distributed, Bunyala/Bulemia/149, is registered in the names of 2 individuals, that is to say the father of the applicant and the father of the protestor. It would appear that each of the 2 is entitled to ½ share. As indicated above, only the ½ share due to the deceased should be subjected to succession proceedings in this cause, and not the share due to his brother, the estate of the father of the applicant. More importantly, the applicant is agitating a case that Kona Masakhwe has a share or interest in Bunyala/Bulemia/149, yet the said Kona Masakhwe is not registered in the instrument as a proprietor. He claims ancestral rights or a customary trust. I cannot determine whether such customary trust exists or such ancestral rights accrue. The title to Bunyala/Bulemia/149 is in the name of the deceased and that of the father of the applicant. I cannot, in these probate proceedings, determine whether or not a third party has interests in that title. Firstly, these are probate proceedings, where the court has jurisdiction limited to the sole purpose of distributing assets of an estate that are free. A contested title is not free, and is not available for distribution. Secondly, I sit at the High Court, and, by dint of articles 162(2) and 165(5) of *the Constitution*, I have no jurisdiction to determine questions around title to property. Whether a third party has an interest in a title vested in another, or belonging to another, would be a question around the issue of title. A person claiming that a customary trust, or any other trust, for that matter, accrues in a title or property in the name of another in his favour, claims a right to such property akin to entitlement to share in that title or property. That would be a question around title. As a Judge of the High Court, I would have no jurisdiction to determine that question, for *the Constitution* has not conferred upon me the jurisdiction to determine it. It does not matter that that issue arises in probate proceedings, it would still be a question of title to land. The ideal thing would be to place the question before the court with jurisdiction, which is to say the Environment and Land Court or an enabled subordinate court. Thirdly, issues about declaration of trusts are not ideal for determination in probate proceedings, whether raised in an application for revocation of grant or at confirmation of grant. Rule 41(3) of the *Probate and Administration Rules* provides that when such questions arise, at confirmation, separate proceedings ought to be initiated, for resolution of those questions. In the meantime, the confirmation proceedings would be held in abeyance, to allow for determination of the separate proceedings. The issue that the applicant has flagged, about the interest of Kona Masakhwe in Bunyala/Bulemia/149, is not a succession issue, but a land matter, which cannot be thrashed out in these proceedings, and in respect of which this court has no jurisdiction.



15. The protestor has been branded an individual who is not cooperating, and who is troublesome. It would appear that attempts have been made to arm-twist him. There is no need to demonize the protestor. Let the parties do the right thing, by proceeding in the manner that I have indicated above, in the foregoing paragraph. The protestor is entitled to, and is within his rights, to assert his legal rights over Bunyala/Bulemia/149. The property is registered in the name of his father and that of another. A third party, whose name is not in the title document, is being brought into the matrix. It should be up to those who seek to assert that Kona Masakhwe has a right to that property to do the needful. On paper, and technically and legally, Kona Masakhwe has no right to a share in that property, unless the court orders otherwise. The court with jurisdiction ought to be moved properly, so that that issue is thrashed out once and for all. I reiterate that that issue cannot be resolved here. I am not ready to purport to exercise a jurisdiction which the Constitution has declared that I do not have, sitting as a Judge of the High Court.
16. I believe I have said enough, to demonstrate that the hearing of the summons for confirmation of grant, dated December 7, 2021, is premature, and that the issues that are being placed before this court for determination are beyond its jurisdiction, and some of them are for agitation in separate proceedings. I shall, accordingly, not determine the said application. I shall hold it in abeyance, under rule 41(3) of the Probate and Administration Rules, to enable the parties place the question of the customary rights of Kona Masakhwe, over Bunyala/Bulemia/149, before the court with the appropriate jurisdiction, for determination of that question. The issues, as to the rights of the sisters of the protestor to a share in their late father's estate, and of those of the persons who purported to buy land from the protestor, shall be addressed and determined at the resumed hearing of the confirmation application.
17. In the end, I make final orders as follows:
- a. That the issue as to the rights of the father of the applicant and Kona Masakhwe to a share in Bunyala/Bulemia/149 are not appropriate for determination in the instant succession proceedings;
  - b. That the High Court has no jurisdiction to determine, in these proceedings, the question of a customary trust or ancestral rights accruing out of Bunyala/Bulemia/149 in favour of Kona Masakhwe;
  - c. That I hereby postpone confirmation of the grant herein, by dint of section 71(2)(d) of the Law of Succession Act, to enable initiation of separate proceedings, by virtue of rule 41(3) of the Probate and Administration Rules;
  - d. That the matter shall be mentioned after 1 year to monitor progress;
  - e. That each party shall bear their own costs; and
  - f. That there is leave, of 30 days, for any aggrieved party, to move the Court of Appeal, appropriately.
18. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023**

**WM MUSYOKA**

**JUDGE**

Advocates



Mr. Wesonga, instructed by Wesonga Wamalwa & Kariuki, Advocates for the applicant.

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

