



**Okello v Onyango (Succession Appeal E002 of 2022)  
[2023] KEHC 22828 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION APPEAL E002 OF 2022  
WM MUSYOKA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PATRICK OTHIENO OKELLO ..... APPELLANT**

**AND**

**JULIUS AGUNJA ONYANGO ..... RESPONDENT**

*(an appeal arising from orders made in the ruling of Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCS No. E034 of 2021, allegedly, of 18th May 2022)*

**JUDGMENT**

1. The appeal herein arises from a decision of the trial court, in Busia CMCS No. E034 of 2021, allegedly delivered on 18<sup>th</sup> May 2022. The grounds of appeal revolve around the trial court overlooking the provisions of section 26 and 29 of the *Law of Succession Act*, while dismissing his application for reasonable provision, dated 8<sup>th</sup> September 2021; the court erring in holding that the registration of the elder son over the suit land under primogeniture customary law was absolute to the detriment of his siblings; the court holding that the father of the appellant had land elsewhere without any proof; the respondent being the party who should have provided proof that the father of the appellant had benefited from land at Ujuanga Sub-Location; the court being biased in favour of the respondent with regard to its conclusions on the Ujuanga land; the trial court erring in finding that the appellant never raised the issue during the lifetime of the deceased; among others. The appellant would like the said decision set aside, and a retrial ordered specific to the Ujuanga land.
2. The impugned ruling is not dated, nor was it delivered on 18<sup>th</sup> May 2022. The ruling was actually delivered on 12<sup>th</sup> May 2022, and turned on a summons for reasonable provision, dated 8<sup>th</sup> September 2021, filed by the appellant. The appellant prayed for adequate provision or share of 1.25 acres from Marachi/Bukhalalire/186, which was an asset in the estate of the deceased. The appellant averred that he was a sibling of the deceased, with 3 others. He asserted that Marachi/Bukhalalire/186 was



ancestral land, which belonged to their late father, who died before land adjudication and registration was done. When that exercise commenced, the land was adjudicated in favour of and registered in the name of the deceased, in trust for his siblings, in equal shares. He averred that their mother had gotten elders to demarcate the land on the ground, but the deceased uprooted the boundary marks. He stated that he caused citations to issue to the respondent, and when the respondent obtained representation, in his confirmation application, he allocated the whole of Marachi/Bukhalalire/186 to himself. He complained that he did not get to sign the consent on distribution. He stated that Marachi/Bukhalalire/186 ought to be shared out equally between him and his brothers, including the deceased. He attached a copy of the citation that he caused to issue for service on the respondent.

3. The respondent reacted to that application by filing grounds of opposition, dated 18<sup>th</sup> October 2021. It was argued that the appellant was not a dependant of the deceased, within the meaning of section 29 of the *Law of Succession Act*, Cap 160, Laws of Kenya; that there were other dependants of the deceased who had not been provided for under section 28 of the *Law of Succession Act*; and that the appellant had been adequately provided for from the estate of the deceased in the summons for confirmation of grant, dated 23<sup>rd</sup> May 2021.
4. He followed up the grounds of opposition, with an affidavit in reply, sworn on 10<sup>th</sup> January 2022. He averred to be a son of the deceased, who had been survived by 2 widows, who had between them 12 children, who were entitled to Marachi/Bukhalalire/186. He acknowledged the appellant as his uncle, for he was brother of the deceased. He stated that his grandfather, the late Lucas Oyengo, originated from a village called Ujwang'a, in Ugenya, where he had his ancestral home. He asserted that the appellant was entitled to land at Ujwang'a, and not Marachi/Bukhalalire/186. He asserted that Marachi/Bukhalalire/186 was registered in the name of the deceased as absolute proprietor, and not in trust. He complained that the appellant was seeking to enforce a non-existent trust in succession proceedings, and if he was minded to have the issue resolved, he should have filed a separate suit, at the Environment and Land Court. He stated that he had proposed to give the appellant a portion of Marachi/Bukhalalire/186, in his summons for confirmation of grant. He further stated that the appellant ought to file an affidavit of protest to the pending summons for confirmation of grant, instead of pursuing the summons for reasonable provision. He attached a letter from the Chief, listing the survivors of the deceased; copy of the title deed for Marachi/Bukhalalire/186; and copy of a certificate of official search for Marachi/Bukhalalire/186.
5. The appellant filed an affidavit, sworn on 19<sup>th</sup> January 2022, in reaction to the grounds of opposition,. He essentially concedes that his name was disclosed in the petition and the summons for confirmation of grant, but asserts that in spite the disclosure, he was not provided for in the said summons for confirmation of grant. He asserts that he was a dependant of the deceased, and should have been provided for.
6. The application was canvassed by way of written submissions, and in the end, the court ruled that there was no evidence of a trust, the appellant should have pursued that issue with the deceased during his lifetime, the father of the appellant had land elsewhere from which he was entitled to inherit, and the respondent had made provision for him in his summons for confirmation of grant.
7. Both sides filed their respective written submissions, without waiting for directions to be given on the disposal of the appeal. I have read through the said submissions, and noted the arguments made.
8. The emerging issues are whether the application dated 8<sup>th</sup> September 2021 was a proper summons for reasonable provision, whether that application was properly handled by the court, whether there was a trust, whether issues around a trust could be handled within succession proceedings, whether the appellant was entitled to land at his father's ancestral home, among others.



9. Let me start with the first issue, whether the said application fits the bill for a summons for reasonable provision. It is brought under section 26 of the [Law of Succession Act](#), Cap 160, Laws of Kenya. Section 26 falls under Part III of the Act, which provides for reasonable provisions, also known as family provisions. It is intended to cater for persons who were dependent on the deceased, during his lifetime, and who find themselves inadequately catered for out of his estate, either by his will, or in intestacy, or in gifts in contemplation of death. The deceased herein died intestate, for no will has been placed on record, and none is alleged to be in existence. The question of gifting in contemplation of death does not arise.

10. Section 26 of the [Law of Succession Act](#) provides as follows:

“26. Provision for dependants not adequately provided for by will or on intestacy Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

11. Was there inadequate provision? The issue is around distribution. In testate succession, distribution is as per the will of the deceased, and it would be clear, from the face of the will, whether there was adequate, or inadequate, or no provision at all. One is, therefore, able to tell, right from when the will is disclosed, whether or not the issue of adequacy of provision arises. It is more difficult in intestacy, for distribution is done by the court, at the confirmation of grant, and the issue of what is proposed, by way of distribution, does not arise until an application for confirmation of grant is filed under section 71 of the [Law of Succession Act](#). That would mean that a person who feels inadequately provided for, from the proposals at confirmation, may file an affidavit of protest, under Rule 40(6) of the Probate and Administration Rules, in response to the summons for confirmation of grant, or may file a separate application, altogether, premised on section 26 of the [Law of Succession Act](#), and get it heard prior to the confirmation application, in order to obviate falling into the pitfall in section 30 of the [Law of Succession Act](#), or the court may hear the 2 applications, that for confirmation and that for reasonable provision, simultaneously.

12. Rule 40(6) of the [Probate and Administration Rules](#) provides as follows:

“40. Application for confirmation of grant

(1) ...

(2) ...

(4) ...

(5) ...

(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

(7) .....



13. However, under the Probate and Administration Rules, reasonable provision may be sought either before the grant has been made or after. Where it is sought before, the applicant would move the court by petition, and where it is sought after the grant has been made, then it has to be by way of a summons for reasonable provision. See rule 45(1)(2) of the *Probate and Administration Rules*. The application before grant is made is suitable in cases of testacy, where the will has been made public, and the person who was dependent on the deceased, and who is not provided for, may move the court by petition, without having to wait for representation to be obtained. It may also be filed in intestacy, by a person who is not within the circle of immediate survivors of the deceased, meaning that even after the grant is obtained, he would be a remote survivor or person not entitled to a share in the estate by law, and may have to rely on the reasonable provisions to access the estate. For immediate survivors, however, such as spouses and children, the best option should be to wait for a summons for confirmation of grant to be mounted.
14. Rule 45(1)(2) of the *Probate and Administration Rules* provide as follows:
- “45. Application under section 26 of the Act
- (1) Every application to the court under section 26 of the Act shall, where a grant has been applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased:
- Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.
- (2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant...”
- (1) Every application to the court under section 26 of the Act shall, where a grant has been applied for or made but not confirmed, be brought by summons in Form 106 in that cause, or, where no grant has been applied for, be brought by petition in Form 96; and the summons or petition and supporting affidavit shall be filed in the registry and copies thereof served upon the personal representative of the deceased:
- Provided that, if representation has not been granted to any person, a copy of the petition and supporting affidavit shall be served upon the persons who appear to be entitled to apply for a grant under the Act.
- (2) The application shall be supported by evidence on affidavit in Form 15 or 16 stating that no grant of representation to the estate of the deceased has been confirmed and containing, so far as may be within the knowledge of the applicant...”
15. The above discussion highlights the fact that an application for reasonable provision can be mounted at any stage, before the grant is confirmed, and, therefore, the estate distributed. By virtue of section 30 of the *Law of Succession Act*, no application for reasonable provision is to be entertained after the



grant has been confirmed. To the extent that the application herein was filed prior to the grant being confirmed makes it a valid application. Section 30 of the *Law of Succession Act* provides as follows:

“30. Limitation of time No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”

16. However, there is a secondary question, whether the appellant herein had the locus standi to initiate such an application. Reasonable provision can only be sought by a defined category of individuals. The qualifications or criteria are in sections 26 and 29 of the *Law of Succession Act*. Under section 26, it is whether the appellant was inadequately provided for, and under section 29, it is whether he fell within the category of persons who could be defined as dependants under that provision, and who would meet the criteria for filing for reasonable provision. Whether he was inadequately provided for would depend, naturally, on whether one was a dependant in the first place, under section 29.

17. Section 29 of the *Law of Succession Act* provides as follows:

“29. Meaning of dependant For the purposes of this Part, “dependant” means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
  - (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
  - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
  - (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
  - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

18. The categories of dependants in section 29 are 2. The first category is of the spouses and children of the deceased. These do not have to prove dependency, that is that they were dependent on the deceased. The appellant was not a spouse nor child of the deceased, so he did not fit within this category. The second category is of those who have to prove dependency. It comprises largely of individuals who were not immediate survivors, that is individuals who do not fall within the circle of spouses and children. Those in the second category are parents, stepparents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into the family as his own, siblings, halfsiblings and the husband of the deceased, if the deceased was a woman. Going by the second category, it would appear that the appellant herein qualified to bring an application, being a brother or sibling of the deceased.



19. Being a brother is one thing, being dependent on the deceased is another. A brother of the deceased would qualify to bring an application, under section 26, as a dependant, upon proof that he was dependent on the deceased during his lifetime. Dependency is gauged along the lines of depending on the deceased for his wellbeing. The best test would be whether he was dependent in the same mode as an immediate family member, a wife or child of the deceased. Did he depend on him for food, shelter, clothing, medical care, educational or schooling needs, among others? If the alleged dependency was within that mode, then he would fit the definition of a dependant.
20. Does the claim by the appellant fall within that mode? It did not. I have scoured through the affidavit, sworn in support of the application, and noted that he did not claim that the deceased provided him with food and shelter, or was responsible for his healthcare and educational needs. His case is that the land, registered in the name of the deceased, was ancestral land, and, therefore, it did not belong exclusively to the deceased, for others, outside the circle of his widows and children, were also entitled to it. That was not a case of dependency. His claim was not founded on dependency. He did not claim to be dependent on the deceased, nor prove to be so dependent, and, therefore, he was not a dependant of the deceased. He was not qualified to mount an application under section 26 of the [Law of Succession Act](#), in the circumstances. His application was not properly founded, and was properly dismissed by the trial court.
21. Let me advert now to the manner the application was handled or disposed of by the court. The trial court did not take oral evidence, instead the application was canvassed by way of written submissions, founded on affidavits. With respect, except where the application is by a person falling within the first category, of wives and children, an application mounted by the persons in the second category, who have to prove dependency, cannot be effectively proved in a case canvassed only by affidavits and written submissions. That is particularly so where the allegations are that the land in question was ancestral, and was registered in the name of the deceased in trust. There would be need to take oral evidence, where evidence is taken on the adjudication and registration processes that led up to the registration of the deceased as the proprietor of the subject property, and the circumstances of such registration. That may require the oral evidence of individuals who were privy to the adjudication process, and production of the records relating to the demarcation, adjudication and registration. The trial court should have taken viva voce evidence, to deal with these issues. The trial court did not have any evidence that the father of the appellant had ancestral land at Ujwang'a village in Ugenya. That issue could only be highlighted properly through oral evidence, subjected to cross-examination. The trial court relied only on the untested allegations of fact made in the affidavit of the respondent, regarding existence of the alleged ancestral land.
22. The appellant was asserting a trust. The question is, can the probate court determine a trust within a succession cause? I do not think it should. The succession cause is initiated for the sole purpose of distribution of the free property of a deceased person. An asset, in respect of which it is asserted that a trust ought to be declared, cannot be free property, available for distribution before that issue is resolved. Of course, where the parties are agreed on the existence or incidence of that trust, the probate court may go ahead and distribute the estate, catering for that agreed trust. Where, however, the alleged trust is disputed, it would be imprudent to declare that trust in succession proceedings, for the same are not suited for that purpose. In [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), it was stated that there is no jurisdiction in succession proceedings, whether for revocation of grant or otherwise, for declaration of trusts or determination of ownership of contested estate assets.



23. Where disputes arise over assets, that are placed before the court for distribution, the principle, as stated in Rule 41(3) of the Probate and Administration Rules, is that the issue ought to be placed before another court, in separate proceedings, for determination of the question, and that it is after the property is determined to be estate property, or the share due to the claimant is determined in those separate proceedings, that the dispute property should be handled by the probate court, for purposes of distribution. See *In the Estate of Stone Kathuli Muinde (Deceased)* [2016] (Musyoka, J) and *In re Estate of Julius Ndubi Javan (Deceased)* [2018] KLR (Gikonyo, J). Declaration of trust over land is a land matter. It is an ownership title issue. It is a jurisdiction not vested in the High Court, but the Environment and Land Court, and that is where the appellant should have taken his dispute, instead of placing it before the probate court.

24. Rule 41(3) of the Probate and Administration Rules provides as follows:

“41. Hearing of application for confirmation

(1) ...

(2) ...

(3) 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.

(4) ...”

(1) ...

(2) ...

(3) 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.

(4)

...”

25. Was the appellant entitled to the ancestral land at Ugenya? I doubt that any credible evidence was led on the existence of the Ugenya land. All there was, was a claim by the respondent, in an affidavit. The appellant challenged that in a reply. The 2 parties were not on common ground on that issue, and there was no basis, therefore, for the trial court to conclude that he was entitled to a share of ancestral land that was not even proved to exist. No registration details of that land were given. It was merely



described as ancestral land at Ujwang'a village, within Ugenya Sub-County. That issue should have been subjected to viva voce evidence, as argued above.

26. Overall, it is my conclusion that the trial court came to the right conclusion, that the Motion, dated 8<sup>th</sup> September 2021, was not merited. The same was properly dismissed. I, accordingly, find no merit in the appeal herein. I hereby dismiss it. Being a family matter, each party shall pay their own costs. Orders accordingly.

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

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

**Appearances**

Patrick Othieno Okello, the appellant, in person.

Mr. Okeyo, instructed by Okeyo Ochiel & Company, Advocates for the respondent.

