



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 195 OF 2015

IN THE MATTER OF THE ESTATE OF JOSEPH ATANG'O AKIDA alias OTANGO ACHITA (DECEASED)

JUDGMENT

1. There are two applications for simultaneous determination, a summons for revocation of grant, dated 10th March 2016, and a summons for confirmation of grant, dated 18th February 2020.
2. The deceased herein died on 18th August 1996. The Chief, of Matungu Location, says, in his letter of 2nd April 2015, that he was survived by five sons and a buyer. The sons are listed in that letter as Wilfred Makokha Otange, Akida Otango Jeremiah, Peter Oyila Joseph, Peter Musonga Otang'o and Charles Rapong'o Otang'o. The buyer is said to be Shabon Mung'oni Nyapola. The Deceased is said to have died possessed of North Wanga/Mayoni/206. Representation to his estate was sought in a petition that was lodged herein, by Akida Otango Jeremiah, on 8th April 2015, in his capacity as son of the deceased. He listed himself and the four others mentioned in the Chief's letter as the persons who survived the deceased, and Shaban Mungoni Nyapola as a liability. The deceased is expressed to have died possessed of North Wanga/Mayoni/206. A grant of letters of administration intestate was accordingly made to him on and dated 10th June 2015. I shall refer to Akida Otango Jeremiah as the administrator.
3. On 10th March 2016, the summons for revocation of grant, of even date was lodged, by Samuel Ochola Okworo, Vincent Futumbo Okworo and Gabriel Ohila Okworo, on grounds that the grant was obtained through a defective process, undermined by fraud, untrue allegations and concealment of information from the court. I shall refer to Samuel Ochola Okworo, Vincent Futumbo Okworo and Gabriel Ohila Okworo as the applicants. The principal complaint is that the administrator did not disclose in his petition all the survivors of the deceased and there was no consent executed by the other survivors who were not petitioning. It is also complained that it was not disclosed that North Wanga/Mayoni/206 was ancestral land, although registered in the name of the deceased. It is explained that the deceased was a brother of the late Michael Okworo, the father of the applicants, and that the two were entitled to the land through inheritance from their late father, but the land was registered in the name of the deceased during the adjudication process in 1967, and he was to hold it in trust on behalf of the two families. It is averred that both the deceased and the father of the applicants and their children were all born in and occupy North Wanga/Mayoni/206. It is averred that the father of the applicants was buried on North Wanga/Mayoni/206 after he died in 1975. He is said to have been survived by three sons, being the three applicants. They, therefore, assert a stake in the estate of the deceased herein.
4. The administrator responded to the revocation application vide his replying affidavit, sworn on 21st December 2016, filed herein on 20th April 2017. He concedes that the applicants were children of his uncle, but contends that North Wanga/Mayoni/206 was not ancestral land, saying that the ancestral land was actually North Wanga/Mayoni/244, and that it was from the latter parcel of land that the applicants ought to be laying a claim to. He asserts that North Wanga/Mayoni/206 belonged to the deceased, because it was registered in his name. He avers that their grandfather, Akida Ofutumbo, that is to say the father of the deceased and the applicants' father, had four sons, being the deceased herein, the late Michael Okworo, Oyoda Akida and Baraya Akida. He explains that Oyoda Akida's land is North Wanga/Mayoni/142, while North Wanga/Mayoni/244 was registered in the name of Baraya Akida. He asserts that North Wanga/Mayoni/244 is family land, and that that was where the share for the applicants' father was. He states that the deceased had given the applicants father one acre on North Wanga/Mayoni/206, out of sympathy. He accuses the applicants of intermeddling, by selling off portions of the land without authority, and of threatening the administrator.
5. The summons for conformation of grant is at the instance of the administrator. He identifies the survivors of the deceased to be the five sons listed in the petition. He proposes that the property should devolve wholly upon himself, that is Akida Otango Jeremiah. He swore another affidavit on 10th December 2020, filed herein on 12th January 2021, which largely repeats the averments made in his affidavit in reply to the revocation application sworn on 21st December 2016. The only difference is that he claims that the applicants were entitled to a share in North Wanga/Mayoni/224, and not the North Wanga/Mayoni/244 that he mentioned in the earlier affidavit. The application is supported by Charles Rapong'o Otango, through an affidavit that he swore on 16th November 2020, filed herein on 23rd November 2020. .
6. The applicants filed separate protest affidavits, that is to say Samuel Ochola Okworo, Gabriel Ochola Okworo and Eunes Olumasayi Futumbo the wife of the late Vincent Futumbo Okworo, all sworn 12th May 2021. The affidavits are word for word replicas of each other. They continue to aver that the estate asset, North Wanga/Mayoni/206, was registered in the name of the deceased in trust for their late father.

They aver that the deceased had distributed the land on the ground and physical demarcation had been done, but he died before title deeds were issued. They further aver that their father died in 1975 and was buried on the land, while their mother died in 1990 was buried there too. They aver that the deceased had instructed that each of the applicants be given two acres out of North Wanga/Mayoni/206. They have proposed that North Wanga/Mayoni/206 be shared out between the two families at the ratio of 9:6, so that the family of the deceased take nine acres, and the balance of six devolve upon the applicants, to be shared equally.

7. The matter was heard orally on 28th September 2022. Both sides breathed life to the averments made in their respective affidavits.

8. It is common ground that North Wanga/Mayoni/206 is registered in the name of the deceased, and that the applicants are not his children, but children of his brother. They contend that he held the property on behalf of their father. The central issue for determination revolves around the ownership of North Wanga/Mayoni/206. If it was held by the deceased in trust for his brother, then it would mean that the administrator obtained his grant irregularly and that the applicants should be treated as persons beneficially entitled to a share in the property. So, before I venture to consider whether the grant was obtained regularly and whether the applicants were beneficially entitled to a share in North Wanga/Mayoni/206, I should first of all dispose of the question as to the nature of the ownership of North Wanga/Mayoni/206, in view of the claim that it was held in trust.

9. The mandate of the probate court is distribution of the property of a dead person, not determination of questions of ownership. Often questions around ownership arise within a probate, between the estate and other claimants, or even amongst persons beneficially entitled. The practice, where such questions arise, is to refer such matters for determination in separate proceedings, through processes designed specifically for dealing with such disputes. That is what is required by Rule 41(3) of the Probate and Administration Rules, which states as follows:

“(3). Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or any condition or qualification attaching to, such share or estate which cannot be at that stage be conveniently determined, the court may, prior to confirming the grant, ..., 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 ... the Civil Procedure Rules ...”

10. A question has arisen in this cause about the share or estate of the late father of the applicants, with respect to North Wanga/Mayoni/206. That question cannot be conveniently determined in these proceedings. The mandate of this court in these probate proceedings is to share out the property of the deceased in accordance with the law governing succession, which is the Law of Succession Act. The issue as to whether the father of the applicants had a stake in North Wanga/Mayoni/206 by way of resulting trust is not a succession issue, but a land ownership issue, that cannot be conveniently determined in these proceedings, without disadvantaging one of the parties, as evidential threshold is likely to be low, hence the same out to be placed before another court for determination of the question as to whether the deceased herein held North Wanga/Mayoni/206 in trust for the estate of the late father of the applicants. That is what Rule 41(3) provides for. I shall, therefore, appropriate and set aside North Wanga/Mayoni/206, and remove it from the distribution schedule, to enable the parties, especially the applicants, move the court in separate proceedings for determination of the issue of the trust. North Wanga/Mayoni/206 is the only asset in the estate, so once it is appropriated and set aside, the court cannot proceed to confirm the grant. The parties will have to await the outcome of the separate proceedings to be initiated, if at all.

11. Related to that is the issue that the High Court no longer has jurisdiction to determine issues around ownership, use and occupation of land. So that when such issues arise, in the context of succession proceedings, the High Court should not determine them, for exclusive jurisdiction over them has been conferred by the Constitution under Article 162(2), on the Environment and Land Court and Article 165(5) of the Constitution is emphatic that the High Court shall exercise no jurisdiction whatsoever over matters that fall under the jurisdiction in Article 162(2). The issue around the trust in North Wanga/Mayoni/206 is really an ownership issue, for if such a trust exists, then it would mean the estate herein ought to cede a portion of North Wanga/Mayoni/206 to the estate of the father of the applicants. There are land occupation and land use issues, for the administrator argues that the deceased gave a portion of North Wanga/Mayoni/206 to the father of the applicants, on humanitarian grounds, to occupy and use, and not to own. Clearly, therefore, the issues around North Wanga/Mayoni/206, as between the estates of the deceased herein and his late brother, bring the dispute squarely under Article 162(2) of the Constitution, and I have no jurisdiction, because of Article 165(5) of the Constitution, to deal with that dispute, and it has to go to another court.

12. Articles 162(2) and 165(5) of the Constitution state as follows:

“162(1)...

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a) ...

(b) the environment and the use and occupation of land, and title to, land.

163 ...

164 ...

165(1) ...

(2) ...

(3) ...

(4) ...

(5) *The High Court shall not have jurisdiction in respect of matters –*

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162(2).”*

13. Article 162(3) of the Constitution required Parliament to pass legislation to determine the jurisdiction and functions of the court contemplated in Article 162(2). Parliament did so, through the Environment and Land Court Act, No. 19 of 2012, which established the Environment and Land Court, and delineated its jurisdiction in accordance with Article 162(2) of the Constitution. The Environment and Land Court is, therefore, the proper court to deal with the issues as between the estates of the deceased herein and his brother over North Wanga/Mayoni/206.

14. The final orders that I feel constrained to make are as follows:

(a) That I postpone confirmation in terms of section 71(2)(d) of the Law of Succession Act, to await determination of the question of a trust over North Wanga/Mayoni/206 in favour of the estate of the father of the applicants;

(b) That I hereby appropriate and set aside North Wanga/Mayoni/206, in terms of Rule 41(3) of the Probate and Administration Rules, and direct the parties, should they be so minded, to initiate separate proceedings with relation to the claim by the estate of the late father of the applicants in North Wanga/Mayoni/206;

(c) That the matter may be mentioned after one year to monitor whether any action has been taken in terms of order (b), above, and for further directions;

(d) That the matter of revocation of the grant or confirmation of the administrator as such shall remain in abeyance to await the proceedings envisaged in (b) above;

(e) That each party shall bear their own costs; and

(f) That any party aggrieved by these orders has leave of twenty-eight days to move the Court of Appeal appropriately.

15. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JANUARY 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, court assistant

Akida Otango

Samuel Ochola

Eunes Olumasayi

Gabriel Ochola