



REPUBLIC OF KENYA



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**In re Estate of Jairo Omido Kamadi (Deceased) (Succession Cause
282 of 2010) [2022] KEHC 12631 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 282 OF 2010**

WM MUSYOKA, J

JULY 29, 2022

JUDGMENT

1. The initial administratrix herein was Annah Ingesia Omido. Her grant was confirmed on July 23, 2012, on the basis that she was the widow and the beneficiaries were her children. The estate, said to be Butso/so/Shikoti/17, was shared out between her and 5 children, being Edward Omido, David Omido Kamadi, Rose Omido Kamadi, Reuben Omido Kamadi and Pamela Omido Kamadi. She took 4 acres, while the children took 2 acres each. A certificate of confirmation of grant in those terms was issued, dated July 27, 2012.
2. The administratrix died on January 16, 2016. An application for her substitution, dated December 7, 2020, was brought by Edward Omido Kamadi and Rose Omido Kamadi, in the capacities as children of the deceased. The consent for substitution, dated December 7, 2020, was filed simultaneously with the application. It was signed by the two of them., that is to say Edward Omido Kamadi Omido Kamadi and Rose Omido Kamadi Omido Kamadi.
3. The application, dated December 7, 2020, was placed before me on May 17, 2021, and I allowed it. A grant was issued to the two, dated May 17, 2021. I shall refer to Edward Omido Kamadi and Rose Omido Kamadi as administrators.
4. The orders of May 17, 2021 provoked the filing of the summons dated June 7, 2021, by David Kisaka Omido. I shall refer to him as the applicant. He seeks a variety of orders:
 - (a) Revocation of the grant made to the administrators on May 17, 2021;
 - (b) His appointment as the sole administrator of the estate;
 - (c) Rectification of the certificate of confirmation of grant to include individuals who had been left out of the process, addition of assets that had been left out, and re-distribution of the assets to all the survivors of the deceased; and
 - (d) Issuance of an amended certificate of confirmation of grant.



5. He avers that the persons that the initial administratrix had left out were 4 daughters, a son and a daughter in law, being Florence Olesi Anyanje, Janet Midalano Omido, Ageyo Carolyne Omido, Marione Makungu Omido, Margaret Kaziliua Webuye, Tom Inima Omido and Esther Nyamisa Kamadi, respectively. The assets left out were Kakamega/Bugonda/369, 952, 1462 and 1491 and Mombasa/Block XII/125. He proposes that Butsotso/Shikoti/17 be shared equally between Edward Omido Kamadi, David Kisaka Omido and Reuben Omido Kamadi; Kakamega/Bugonda/369 to 952 Esther Nyamisa Kamadi, Kakamega/Bugonda/1462 and 1491 to Tom Inima Omido; and Mombasa/Block XII/125 to be shared equally between Florence Olesi Anyanje, Pamela Minyozo Omido Minyozo Omido, Margaret Kaziliua Webuye, Marione Makungu Omido, Rose Nyangasi Omido, Janet Midalano Omido and Ageyo Carolyne Omido.
6. The two administrators opposed the application dated December 7, 2020. They swore separate affidavits on October 13, 2021.
7. In her affidavit, Rose Omido Kamadi avers that their late mother, the initial administratrix, before she died, had left all the documents in her custody with intention to proceed from where she had reached, and that the dead administratrix refused to entrust the matter on the applicant. She approached her siblings, for assistance, for she felt that she could not do it alone, but the applicant refused to cooperate, but Edward Omido Kamadi and Reuben Omido Kamadi did, whereupon she and Edward Omido Kamadi sought to substitute the administratrix as administrators. She avers that the substitution was designed to enable them complete administration of the estate from where the dead administratrix had left off. She avers that Butsotso/Shikoti/17 was the only asset that the dead administratrix was aware of. She says that the widow had been allocated 4 acres in Butsotso/Shikoti/17, which she proposed should be shared equally amongst the children; Edward Omido Kamadi, Rose Omido Kamadi, David Kisaka Omido, Reuben Omido Kamadi and Pamela Minyozo Omido, with each taking 2.8 acres. She avers that the proposal by the applicant seeks to disinherit the daughters of the deceased. She avers that Kakamega/Bugonda/369, 952, 1462 and 1491, may have been left out by error. She supports the distribution of those assets, save for Mombasa/Block XII/125, which she says the deceased had allocated to her, and which she had since extensively developed. Although she avers, in the affidavit, to have attached a letter to the affidavit to show the allocation, no such letter is annexed. Indeed, the affidavit has no annexures.
8. In his affidavit, Edward Omido Kamadi reiterates and repeats what is averred in affidavit of Rose Omido Kamadi. He avers that Mombasa/Block XII/125 had been given to Rose Omido Kamadi during the lifetime of the deceased, and she had extensively developed it. He alludes to a letter to that effect, which he claims is annexed, but there is no such annexure to his affidavit. He states that he had approached the applicant to sign the consent for substitution of the dead administratrix but he failed to cooperate. He avers that the deceased had a second family, which the applicant had acknowledged in his proposals, and he proposes that he should represent the first house, while the second house picks its own representative. He avers that there was no ill intention to disinherit the daughters of the deceased. He avers that he and the dead administratrix were not aware of the assets that had been excluded from distribution in 2012.
9. As the application of June 7, 2021 seeks revocation of grant. I directed that it be heard *viva voce*.
10. The oral hearing happened on November 24, 2021. The applicant was the first on the witness stand. He said the initial administratrix initiated the process secretly, hence she was unable to implement the confirmation orders. The new administrator then took over and tried to implement the same wrongly. He stated that they had sat as family and agreed that he be the administrator, but the administrators rushed and applied for substitution. He averred that the deceased had only one wife, his mother, the



other wife having left earlier, but leaving behind children. He asserted that Rose Omido Kamadi and Edward Omido Kamadi could not be trusted as administrators. He said Butso/17 was for sons only. He asserted that Mombasa/Block XII/125 had not been given to Rose Omido Kamadi by the deceased, although he conceded that she had developed it. He asserted that all the assets belonged to the deceased.

11. Tom Inima Omido, Reuben Omido Kamadi, Isuli Omido, Florence Olesi Anyanje, Esther Nyamisa Kamadi, Margaret Kaziliua Webuye and Margaret Minyoso Omido, all gave unsworn statements, to effect that they supported the application by the applicant. Janet Midalano Omido also gave an unsworn statement. She stated that she did not support either side, and proposed equal distribution to all.
12. The administrators testified on February 24, 2022, Edward Omido Kamadi was the first to take the stand. He stated that he was not aware that he needed the consent of his siblings before initiating the substitution of their dead mother as administrator, but added that the dead administratrix had obtained their consent before she obtained representation. He stated that he had notified all the other beneficiaries, but he had listed them as such. He stated that the property they sought to distribute belonged to their mother. He stated that Francis Kamadi and Tom Omido had been given land in Maragoli; which he, the applicant and Reuben Omido Kamadi were shown where to build in Butso/17. He asserted that the three of them were the only ones entitled to shares in Butso/17. He stated that Mombasa/Block XII/125 belonged to the deceased, as the deceased had not shared it out. He had only left Rose Omido Kamadi in charge. He said that the daughters of the deceased should get a share in the estate. He said that the Maragoli family was the second family, but the deceased had raised all of them together.
13. Rose Omido Kamadi followed. She asserted that the applicant was made aware of the substitution process. She said that they had not sat as a family to agree that Rose Omido Kamadi and Edward Omido Kamadi substitute the dead administratrix. She stated that there were 6 daughters, and 1 of them had died. She stated that she held the share for the daughters, and would defend them, and that what would go to her would go to the daughters. She said that the Mombasa lands/houses belonged to the deceased. Mombasa/Block XII/125, she said, was bought by the deceased, and Janet Midalano Omido spent kshs 1,000,000.00 to develop it.
14. The parties did not submit, at the close of the oral hearings.
15. The matter is fairly straight forward. It is for revocation of grant. The discretion to revoke grants is given in section 76 of the *Law of Succession Act*, cap 160, Laws of Kenya. A grant will be revoked where the proceedings to obtain it were defective in substance or the process was riddled with fraud and misinformation. The second ground is where there is maladministration, that is the other way of talking about failure of the administration of the estate. The other is where the grant has become useless on account of changed circumstances.
16. Section 76 states as follows:

“ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

 - (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.”

17. From my assessment of the filings and the oral evidence, the applicant appears to ground his application on the first two general grounds, that the process of obtaining the grant had problems, and that there was failure of administration. I will consider the first issue first.
18. There have been two grants made in this cause. The first was made to the widow of the deceased, Annah Ingesia Omido. She died, and, therefore, being the sole administratrix, her grant became useless and inoperative. Consequently, she was substituted by Rose Omido Kamadi and Edward Omido Kamadi, and a second grant was issued. I understand the applicant to be saying that the processes leading to the making of the two grants were fraught with problems. Since the holder of the first grant died, and the grant made to her was automatically revoked, upon a fresh grant being made to Rose Omido Kamadi and Edward Omido Kamadi. There would be no need to audit the process of its making, as that grant is not available for revocation. I shall focus on the grant to Rose Omido Kamadi and Edward Omido Kamadi. They claim that their siblings were aware of the substitution process, yet they have not provided any concrete evidence. They attached a consent on substitution, listing 5 individuals. Two issues arise. One, yet this list only had 5 of them. Out of the 12 or 5 children, whichever way one looks at it, only 2, Rose Omido Kamadi and Edward Omido Kamadi, signed the consent on substitution. It is ironic that the persons seeking to substitute the dead administratrix would be signing the consent form. That consent form should be signed only by those not applying, says that they do not object to the applicants substituting the dead administrator. The execution of the consent by Rose Omido Kamadi and Edward Omido Kamadi served no purpose at all.
19. The consent at the stage of appointment of administrators is required by rules 17 and 26 of the *Probate and Administration Rules*, and it is mandatory where the persons applying for appointment have equal right to administration with the those who are not applying. The other 10 are sons, daughters and daughter in law of the deceased. The sons and daughters of the deceased would have equal right to the administration with Rose Omido Kamadi and Edward Omido Kamadi. Their consents were mandatory. Rose Omido Kamadi and Edward Omido Kamadi should have obtained them; and the omission to do so was fatal to their appointment. Rule 26 of Probate and Administration Rules provides a way out where anyone of them declines to sign the form, the applicants ought to file an



affidavit disclosing that the rest had declined to sign the consent. The Rose Omido Kamadi and Edward Omido Kamadi did not do so.

20. For avoidance of doubt, Rules 17(7) and 26 of the Probate and Administration Rules says as follows:

“17(7) Provided that an objector who has withdrawn his objection shall not be entitled to file a further objection in respect of the same application for a grant.”

“26 Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) ...”

21. I believe that should be sufficient to dispose of the prayer on revocation.

22. The other prayers are on addition of new beneficiaries and assets left out at confirmation. There is consensus that the deceased had other children, 7 in number, who were left out of the process. There is also consensus that the deceased had other assets, besides Butsotso/Shikoti/17. It is only fair that all these children of the deceased be brought on board and all the assets too.

23. Should I distribute the estate at this stage? I do not think I should. The deceased died a polygamist. He had two families. Am told that one family was settled at Shikoti and the other at Maragoli. These proceedings were in fact brought by the Shikoti family to the exclusion of the Maragoli family. The Shikoti family has 5 children while the Maragoli family has 7. It was only told that the second wife left, but nothing was placed before me to show that the marriage had been dissolved. I shall presume that she was the second wife of the deceased, who sired 7 children with her. The estate of a polygamist is dealt with under section 40 of the *Law of Succession Act*. The estate is shared according to the houses, depending on the number of children in each house. It is critical, therefore, that whoever applies for confirmation of their grant must group the family of the deceased into houses, listing the widows and children in each house. That makes it easier for the court to distribute the estate, strictly in the terms of the provisions of section 40 of *Law of Succession Act*.

24. Section 40 provides as follows:

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”



25. The other issue is that the administratrix alluded to one of the daughters of the deceased being deceased. The name of that daughter was not disclosed. There was no disclosure as to whether the said daughter was survived by children. Section 41 of Law of Succession Act provides that children of any dead child step into the shoes of their dead parents. That would mean that the death of a child of the deceased does not lead to extinction of the share to which such child is entitled, for the same passes on to his or her children, through the process of representation or substitution.
26. This is what section 41 says:
- “Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”
27. The other issue is about the property at Mombasa. Some of the witnesses talked of houses or lands at Mombasa belonging to the deceased. The only asset at Mombasa that was disclosed is Mombasa/Block XII/125. It needs to be clarified whether this is the only asset at Mombasa or there are others.
28. There was also mention of a Francis Kamadi. He was not listed amongst the children of the deceased, and I have no way of telling why. It could be that he is a dead child of the deceased, and probably the husband of Esther Nyamisa Kamadi. The parties ought to present clear facts before the court. They should not leave it to the court to speculate. The court should not be given room to speculate. A court acts only on concrete facts. The other thing, parties should not approach these matters with the attitude that these facts are a matter of common knowledge. The court is not a member of the family of the deceased, neither does it come from the community where the family hails from. There is an obligation to disclose everything concerning the estate, by placing all the facts before the court, so that the court can do justice. Even if, for some reason or other, the judicial officer handling the matter is privy to the details of the family of the deceased, there would still be an obligation to make a full disclosure, for the matter could go to a judicial officer who is not privy to the facts, or it could go on appeal to officers who are not privy to the said facts. Family facts are largely private, usually known only to the family, and there is need for full disclosure. It is not the duty of the parties to investigate, it is that of the parties to be open and candid, otherwise the court will be left groping in the dark, making orders which do not satisfy the parties. In the end, forcing them to keep coming back to court, for this or other order, to rectify anomalies caused by their failure to make full disclosure.
29. I shall, therefore, not order distribution before the parties address the issues that I have flagged above.
30. I have concluded that a good case has been made out for revocation of the grant. I will have to appoint fresh administrators. The deceased had two families. Both sides of the family will need to be represented at administration. It is the only fair and democratic way to go about it. The applicant and the current administrators all come from one side of the family, the other side of the family is not represented.
31. The final orders are:
- (a) that the grant made on May 17, 2021 to Rose Omido Kamadi and Edward Omido Kamadi, is hereby revoked;
 - (b) That I set aside the orders made on July 23, 2012 confirming the grant made on November 3, 2010;



- (c) That I declare Florence Olesa Anyanje, Jane Midalano Omido, Ageyo Carolyne Omido, Marione Makungu Omido, Esther Nyamisa Kamadi, Tom Inima Omido and Margaret Kaziliua Webuye as survivors of the deceased and beneficiaries of his estate;
- (d) That I add Kakamega/Budonga/369, 952, 1642 and 1491 to the schedule of the assets of the estate;
- (e) That I direct the applicant and the administrators, or any of them, to file further affidavits, in the next 30 days, to address the issues raised in paragraphs 24, 26, 28 and 29 of this judgment;
- (f) That the survivors and beneficiaries of the estate shall consult and agree on new administrators, 4 in number, 2 from each house, 2 of whom shall be women;
- (g) That the matter shall be mentioned for the purpose of (e) and (f), above, and for further directions;
- (h) That I shall only appoint new administrators and distribute the estate upon full compliance;
- (i) That each party shall pay their own costs; and
- (j) That any party aggrieved by these orders shall have leave of 28 days to file an appeal at the Court of Appeal.

32. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF JULY, 2022

WM MUSYOKA

JUDGE

Mr Erick Zalo, Court assistant.

Ms Andia, instructed by Andia & Company, Advocates for the administrators.

David Kisaka Omido, the applicant, in person.

