



REPUBLIC OF KENYA



In re Estate of Simion Robi Maroa (Deceased) (Succession Cause 14 of 2018) [2022] KEHC 11017 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11017 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 14 OF 2018
RPV WENDOH, J
JULY 27, 2022
(FORMERLY KISII HCC SUCCESSION NO. 17 OF 2012)
IN THE MATTER OF THE ESTATE OF SIMION ROBI MAROA - (DECEASED)
BETWEEN
ESTHER BOSIBORI MINYONGA.....1ST PETITIONER/RESPONDENT
KEFA OCHIENG MOINDE.....2ND PETITIONER/RESPONDENT
VERSUS
GRACE KEMUNTO ROBI.....APPLICANT/OBJECTOR**

RULING

1. The applicant, Grace Kemunto Robi filed this Summons for Confirmation of Grant dated 17/9/2021 on 19/10/2021. The applicant seeks the following orders: -
 - a. The Grant of Letters of Administration Intestate issued to the petitioners/respondents herein on 18/8/2016 and 7/2/2020 be confirmed.
 - b. Consequent to prayer (1) hereinabove, being granted, the Court be pleased to distribute the Estate of the Deceased in terms of the annexed schedule / scheme of distribution.
 - c. Costs of the application be paid out of the Estate.
 - d. Such further and/or other orders be made as maybe expedient and in the interest of justice,
2. The grounds in support of the summons are on the face of the application and the supporting affidavit of Grace Kemunto Robi. These proceedings are in respect of the Estate of Simion Robi Marwa (Deceased) who died intestate on 1/5/2022. The applicant listed the beneficiaries of the estate of the deceased and annexed a letter from the Chief Bukira West Location detailing the list of the heirs (GKR1). It was also deponed that the estate of the deceased comprised of L.R. No. Bukira/Buhirimonono 2023 - 0.05 Ha and L.R. No. Bukira/Buhirimonono/1531 - 6.24 Ha (GKR2).



3. The applicant also deponed that the application is anchored on the orders of this court issued on 7/2/2020 and the consent order of 27/7/2022 (GKR3). The objector also annexed a proposed schedule of distribution (GKR4).
4. The 1st and 2nd petitioners filed separate affidavits of protest dated 6/12/2021. The contents of the affidavits are similar. I shall summarize the affidavit of Esther Bosibori Minyonga the 1st petitioner. She deponed that she is the registered owner of L.R No. Bukira/Buhirimonono/273 which was fraudulently transferred and sub divided into three portions i.e. L.R Bukira/Buhirimonono/2021, 2022 and 2023 by the deceased; that she filed a matter before the Migori ELC Court being No. 889 of 2017 and a judgement was delivered confirming that one of the sub divisions was fraudulently transferred; that she moved the Migori Succession Court by an application and Mrima J gave directions that succession of the estate of the deceased proceeds on the undisputed properties; that upon delivery of the said ruling, the 1st petitioner filed Migori ELC Case No. 34 of 2019 to determine the ownership of the disputed properties L.R No. Bukira/Buhirimonono 2021 and 2023 which is still pending; that the estate can only proceed with the confirmation of L.R. No. Bukira/Buhirimonono/1531 as per the directions given by this court on 27/7/2020.
5. It was further deponed that by the holding of Ongondo J in Migori ELC No. 889 of 2017 that the original land parcel no. L.R. NO. Bukira/Buhirimonono/273 was fraudulently transferred and subdivided, the said L.R. No. Bukira/Buhirimonono/2023 does not form part of the estate of the deceased and it is therefore not a free estate capable of being distributed and the said decision is on appeal and has not been determined.
6. The summons were canvassed by way of written submissions. Both parties filed and complied. I have considered the submissions. The main issue for determination is whether L.R. No. Bukira/Buhirimonono/2023 forms part of the estate of the deceased capable of being distributed.
7. The objector's position is that the summons before this court are as a result of an order issued on 7/2/2020. On the other hand, the respondents' position is that L.R. No. Bukira/Buhirimonono/2023 does not form part of the estate of the deceased and there is a judgement in their favour by Ongondo J in Migori ELC No. 889 of 2017 in which it was held that L.R. No. Bukira/Buhirimonono/273 was fraudulently transferred and there is another pending suit over the same properties in Migori ELC Case No. 34 of 2019.
8. The original parcel number of the suit parcel of land was L.R. No. Bukira/Buhirimonono/273. In her affidavit of protest, the 1st respondent annexed "EBM-01" being a copy of the adjudication record, green cards and mutation forms. The adjudication record shows that L.R. No. Bukira/Buhirimonono/273 was registered in the name of the 1st respondent. Thereafter, L.R. No. Bukira/Buhirimonono/273 was sub divided into three other parcels of land being L.R. Bukira/Buhirimonono/2021, 2022 and 2023 with the title deed holder being Simion Robi Marwa (Deceased).
9. The first directions concerning the parcel of land was issued by Mrima J on 9/4/2019. The court directed that further proceedings in respect to the estate of the deceased be stayed pending the determination of the issue of ownership of the suit parcel of land. The court further directed that the petitioners were at liberty to file proceedings before the Environment and Land Court within 60 days. On the basis of those directions, the respondents filed Migori ELC No. 34 of 2019 which is still pending.
10. By a "Ruling No. 1" dated 8/11/2019, the court reviewed and/or set aside the directions it had given earlier on 9/4/2019. The basis of the decision was that the parties were not given an opportunity to be heard prior to issuance of the directions. The court proceeded to give a ruling date of summons for



revocation of grant dated 2/5/2018. The court rendered its ruling on 7/2/2020 “Ruling No. 2” which ruling is the basis of the instant summons for confirmation of grant.

11. I have carefully read and understood the findings of “Ruling No. 2”. The ruling was in respect to the grant which was confirmed in the names of the respondents in Kisii High Court Succession Cause No. 591 of 2021. It was observed that although the grant was rightly obtained, the confirmation proceedings of 4/5/2017, were irregular as there was no indication in the court record that the beneficiaries as disclosed in the Form P&5 attended court. The same was also the position in the proceedings on the rectification of the grant on 29/6/2017.
12. Further, the court observed that even if the argument by the respondents is that the transfer of the suit land to the 2nd respondent is protected in law, the starting point is how the confirmation proceeding were done. The learned Judge held that the argument can only stand if the confirmation proceedings were regular. Since the beneficiaries’ cardinal rights to be heard was contravened then the confirmation proceedings had to be revisited.
13. Flowing from the above, the court set aside the confirmed grant and rectification proceedings undertaken on 4/5/2017 and 29/6/2017 respectively. It was also ordered that the resultant Certificate of Confirmation and the resultant Amended Certificate of Confirmation dated 4/5/2017 and 29/6/2017 respectively be set aside and the registration of the parcel of land known as Bukira/Buhirimono/2023 to Kefa Oketch Muinde revert to the names of Simion Robi Maroa the deceased herein. The court also directed that the summons for confirmation of grant dated 15/3/2017 be heard afresh.
14. The orders issued in the ruling dated 7/7/2020 were solely on the basis that the beneficiaries were not present during the confirmation proceedings of 4/5/2017. I do not think that the ruling of 7/7/2020 rested the issue of the disputed parcel of land. A reading of the ruling dated 8/11/2019 “Ruling No. 1” between paragraphs 12 - 14 indicates that Mrima J still held the position that where a dispute arises on the ownership of the land subject to the succession proceedings and/or the declaration of trusts over the land in issue, then such a dispute transcends the jurisdiction of a Succession Court courtesy of Article 165 (5) of *the Constitution*, Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 among other relevant legal provisions.
15. The 1st respondent deponed that there was already a determination in Migori ELC Case No. 889 of 2017 on the parcel of land. The decree is annexed as “EMB-02” and it is dated 18/12/2018. The orders in relation to the suit land was that L.R. No. Bukira/Buhirimono/2022 was fraudulently registered and transferred into the names of James Njine Ndigirigi. The ELC Court ordered for cancellation and rectification of the register in respect of the land to revert to Bukira/Buhirimono/273. It was deponed that there is an appeal against the said decision which is pending before the Court of Appeal.
16. Similarly, there is also another pending case being Migori ELC No. 34 of 2019 annexed as “EBM-04” and the subject in dispute are the sub - divisions which arose from L.R. No. Bukira/Buhirimono/273. One of the subdivisions L.R. Bukira/Buhirimono/2023 has been listed to form part of the estate of the deceased. The applicant has not denied the existence of the aforementioned cases pending before the Court of Appeal and the ELC Migori High Court.
17. Section 3 of the *Law of Succession Act* defines free property as:-

“in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;”



18. Even if the applicant interprets the orders emanating from the ruling of 7/7/2020 “Ruling No. 2” to mean that she can proceed with confirmation of the grant as per the summons dated 17/9/2021, it still remains that the issue of the ownership of one of the resultant subdivisions from L.R. No. Bukira/Buhirimono/273 that is L.R. No. Bukira/Buhirimono/2023 is contentious and already pending before the Migori ELC Court being ELC No. 34 of 2019. The said parcel of land cannot be said to be free property capable of distribution as per the Laws of Succession. The estate of the deceased can only proceed for confirmation on the undisputed properties.
19. The final orders are as follows: -
- a. The Protestors’ proceedings are merited.
 - b. The Summons for Confirmation of Grant dated 17/9/2021 is disallowed because it included a contested property.
 - c. The Applicant to file fresh summons for partial confirmation of grant for the non-contentious property i.e Bukira/Buhirimono/1531.
 - d. Costs to be in the cause.
 - e. The application to be filed and served within 30 days.
 - f. Mention on 9/11/2022.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 27TH DAY OF JULY, 2022

R. WENDOHO

JUDGE

Ruling delivered in the presence of;

Mr. Oganga for the Objectors/Applicants

N/A for the 1st and 2nd Respondents

Evelyn Nyauke - Court Assistant.

