



REPUBLIC OF KENYA



**In re Estate of Samson Olubuyi Otsieno (Deceased) (Succession Cause  
403 of 1998) [2022] KEHC 11246 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 403 OF 1998**

**WM MUSYOKA, J**

**JULY 22, 2022**

**IN THE MATTER OF THE ESTATE OF SAMSON OLUBUYI OTSIENO**

**RULING**

1. The application for determination is dated February 6, 2019. It is brought at the instance of Brookway Nyonje and 4 others, who I shall refer hereto as the applicants. It seeks revocation of grant and certificate of confirmation of grant made to Julius Chimoti Otsieno and John Namakhabwa Olubui, and the setting aside of orders made on April 4, 2014.
2. The grounds upon which the application is premised are set out on the face of the application, while the facts are deposed in the affidavit of Brookway Nyonje, sworn on March 7, 2019. The deponent avers that he and his co-applicants had bought land from Isaiah Otsieno Olubuyi, a late administrator of the instant estate, who died on 2006. The late administrator allegedly subdivided Marama/Shinamwenyuli/2 in 2000, and created subtitles, which were then registered in his name and some in the names of his co-applicants. He accuses the current administrators, who I shall hereafter refer hereto as the respondents, of restraining the succession proceedings, by having the certificate of confirmation of grant rectified on July 19, 2018, based on orders obtained on April 4, 2014 cancelling subdivision of Marama/Shinamwenyuli/2. He asserts that the orders of April 4, 2014 were criminally and fraudulently obtained. He asserts further that those orders were obtained without his involvement. He states that a Japheth Chiteri moved into his land Marama/Shinamwenyuli/2094 and he obtained court orders in Butere PMCCC No 184/2011 and got orders to evict him. It was when he sought to execute the orders in PMCCCNO 184 of 2011 that he discovered about the amendment of the certificate of confirmation of grant. He avers that his registration was protected under section 93 of *Law of Succession Act*, cap 160 Laws of Kenya. He states that the confirmation orders of July 19, 2018 were obtained fraudulently and upon concealment of matter from court. It is averred that the late administrator died in 2006 having effected transfer to them in 2000.
3. He has attached copies of title deeds for the subtitles created out of Marama/Shinamwenyuli/2 and transferred to the names of the applicants, being Marama/Shinamwenyuli/2094, 2084 and 2060. He has also attached a copy of the certificate of confirmation of grant, as amended on July 19, 2018. There



is also an annexure of the order extracted on April 4, 2014 from the order of the court made on April 1, 2014.

4. Brookway Nyonje filed another affidavit on July 7, 2019, sworn on June 6, 2019 essentially to aver that Japheth Chiteri had been filing multiple suits to frustrate the orders he had obtained in Butere PMCCC No 184 of 2001 to evict him. He refers to Kakamega ELC Appeal No 9 of 2017, Kakamega HC Misc Application No. 176 of 2018 and Kakamega ELC Appeal No 11 of 2019. He avers that the confirmation orders of 2013 had only distributed Marama/Shinamwenyuli/2 to Japheth Muyia Chiteri and Fridah Nyakowa Anzaya. Later the certificate of confirmation of grant was amended to accommodate persons who had bought parts of the land, that is to say Japheth Muyia Chiteri, Fridah Nyabora Anzaya, Amos Willie Anyanga, Wilson Wanga Nehendo, Albert Nasio Matati, Benjamin Ngongo and Peter Omuya Maina. He further refers to applications dated April 2, 2015, August 26, 2015 and March 15, 2017, which were made to have particulars of estate assets accommodated in the certificate of confirmation of grant. He complains that the applicants were excluded from that process. He had attached, to his affidavit, the various orders made in this cause and in other suits.
5. The administrators responded to the applications, vide an affidavit sworn on August 2, 2019 by John Namakhabwa Olibui, and filed herein on August 3, 2019. He avers that the deceased was his father, and the late administrator Isaiah Otsieno Olubui, was his grandfather, being the father of the deceased. He further avers that the deceased was survived by 4 individuals, being Felesia Asonga, Kwayo, John Namakhabwa Olubui and Ibrahim Narinyi. He states that after the late administrator died, he and his uncle, being the deceased's younger brother, Julius Chimiti Otisieno, substituted the late administrator. He asserts that the deceased, his late father, had sold land to Japheth Chiteri, Henry Ngong Wafula, Peter Maina, Willy Amos Anyanga, Fridah Anzaya, Wislon Wanga Nehendo and Albert Nasio Matati. He states that the restoration of Marama/Shinamwenyuli/2 was ordered in 2014, because the late administrator had distributed the estate in a manner that did not take into account the children of the deceased. He states that Wycliffe Namakhabwa was a step brother of the deceased, and he was not entitled to a share in the estate, while Brookway Nyonje and Everlyne Ayiembo had not bought land from the deceased. He describes the applicants as strangers to the estate.
6. The administrators also filed grounds of opposition, on July 30, 2019, bearing an even date, stating that the applicants were not heirs, and had no *locus standi*, and they could only claim at Environment and Land Court.
7. There is an affidavit sworn by Everlyne Amanaka Ayiembo, sworn on January 22, 2020, and filed herein on January 23, 2020. She avers that she bought a portion of Marama/Shinamwenyuli/2 from the late administrator, Isaiah Otsieno Olubuyi, on August 27, 1998. The portion is subsequently registered in her name as Marama/Shinamwenyuli/2060. She express surprise that her title was cancelled by court order. Although, she avers to have attached a copy of the sale agreement to the affidavit, none is infact attached.
8. There is another affidavit by Albert Nasio Matati, sworn on January 22, 2020, and filed herein on January 23, 2020. He avers to have bought a portion of Marama/Shinamwenyuli/2 from the deceased in 1957, but the died in 1990m before transfer was done. He states that the late administrator of the deceased obtained a representation to the estate, and had their entitlements transferred to them, and the same was registered in his name as Marama/Shinamwenyuli/2064 on March 27, 2000. He asserts that he bought his portion before the current administrators were born, and that they knew nothing about the transaction. He complains that his title was cancelled without notice to him, as he was not notified of the revocation application. Although he purports to annex a copy of the title deed for Marama/Shinamwenyuli/2060, none is attached.



9. Wycliffe Namakhabwa swore his affidavit on January 22, 2020, and filed it on January 23, 2020. He avers to be a brother of the deceased, who had been settled on Marama/Shinamwenyuli/2. He was said to have been survived by 2 sons, being John Namakhabwa and Malinyi Otsieno. He alleges that upon the death of the deceased, Marama/Shinamwenyuli/2 was succeeded by their father, the late Isaiah Otsieno Olubuyi, who summoned the persons who had bought land and they were given their titles. He avers that the applicants had bought land from the deceased and that the administrators were only pretending that they did not know about it. He urges that the grant, as confirmed, should be revoked and the land returned to the owners.
10. When this matter was placed before me on January 23, 2020, I gave directions that the application dated February 6, 2019 be disposed of by way of affidavit and oral evidence, based on the documents filed by the parties. The matter subsequently passed from my hands to F. Amin J, who, on June 2, 2021, revised the direction of 23<sup>rd</sup> January, 2020, and directed that the matter be disposed of by way of written submissions. The parties complied by filing written submissions, and, on July 27, 2021, the matter was reserved for ruling on October 28, 2021. I took over this matter from F Amin J on June 16, 2022, following retirement, and it is on that basis is that I am the one now preparing and rendering this ruling on the application dated February 6, 2019.
11. The application principally seeks revocation of the grant made to Julius Chimoti Otsieno and John Olubui, on March 22, 2012, and issued on June 8, 2012. The grounds upon which a grant is revoked are set out on section 76 of the *Law of Succession Act*, cap 160, Laws of Kenya. One, where the process of obtaining it was fraught with defects, and fraud. Two where the administration has failed. Three, where the grant has been rendered useless on account of changed circumstances. The applicants are complaining principally about orders that this court made in 2014 and 2018, which affected distributions that the court had ordered earlier. They do not appear to be complaining about how the administrators came into office. There is no case that the process of appointing them was defective nor that their grant was obtained by fraud.
12. The applicants do not appear to be complaining about failed administration. Section 76(d) envisages failed administration in terms of failure to apply for confirmation of grant within the timelines set by the law, failure to proceed diligently with administration or to render accounts as and when required. The applicants are not complainant that the administrators have failed to apply for confirmation, nor to render accounts. They have also not directly complained about failure to proceed diligently with administration, although the issue they raise turns on diligence in administration. They argue that the initial administrator had addressed their issues as creditors of the estate, having purchased portions of the estate, by transferring their portions to them, and getting them title deeds. They complain that the new administrators have reversed those transactions to their detriment. The administrators argue that one of the applicants has no claim at all, as he was a stepbrother of the deceased, the other had been catered for by them, while the other two had not bought any land from the deceased but from the late administrator of the estate.
13. It their proof of a failure of administration? I do not think so. The applicants are not children of the deceased, and they, therefore, do not have a direct claim to the estate. One of them is a stepmother of the deceased. He has no claim to the estate, and he is in the application only for the purpose of advancing the case for the other applicants. The administrators have acknowledged the claim by one of the applicants, and, therefore, he has no case to agitate. The claim for the other two has been refuted, on grounds that they never transacted with the deceased, instead they transacted with the initial administrator, who has since died. The argument would be that such a person is not a creditor of the estate, as, at the time of the demise of the deceased, the deceased did not owe or was not liable or indebted to them. Upon their claim being rejected, they can only have recourse to a court of Law



to agitate them claim them. Their dispute with the estate is over land, whether they had a valid sale transaction with the estate. That is an issue as to title and as to validity of a sale of land transaction. Such matters are governed by the Land Registration Act, No 3 of 2012, and the Land Act, No 6 of 2012. Article 165(5) of the Constitution states that the High Court has no jurisdiction over such matters, and jurisdiction is vested in the Environment and Land Court by section 13 of the Environment and Land Court Act, No 19 of 2011, sections 2 and 101 of the Land Registration Act, section 2 and 150 of the Land Act, and Article 162(2) of the Constitution. This court cannot determine whether the transactions between Brookway Nyonje and Everlyne Ayiembo were valid, and whether the two were entitled to a share. Only the Environment and Land Court can deal with such issues. The role of High Court in a probate matter is to share out land which is not disputed. When issues arise as to whether the estate validly sold out land to anyone, the party affected or aggrieved, or even the estate itself, ought to place that issue before the Environment and Land Court for determination.

14. Brookway Nyonje has raised a lot of issues concerning a contest between him and Japheth Chiteri over the estate asset. Both of them are not children of the deceased. The claims they agitate are not succession or inheritance, rights. The probate court cannot, therefore, intervene into their dispute over Marama/Shinamwenyuli/2094. In any case, Marama/Shinamwenyuli/2094 does not exist, following the order of 1<sup>st</sup> April 2014, which canceled the transaction which created Marama/Shinamwenyuli/2094 and reverted the property to the original Marama/Shinamwenyuli/2.
15. I note that the applicants invite me to set aside the orders of April 1, 2014. No reasons have been advanced as to why those orders ought to be set aside. They were granted on an application dated July 2, 2012, which the court administrators had brought seeking to have Marama/Shinamwenyuli/2 reverted to its original status, on grounds that the initial administrator had obtained administration without involving the children of the deceased, had sold a portion of the estate and he had treated himself as the sole heir to the estate. It has not been demonstrated that the court was in error or wrong to make those orders.
16. Overall, I find no merit in the application dated February 6, 2019, and I hereby dismiss the same. Let each party bear their own costs.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 22<sup>ND</sup> DAY OF JULY 2022**

**W.M. MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant

Mr. Ashioya, instructed by Ashioya & Company Advocates for the interested party.

Mr. Brookway Nyonje, Applicant, in person

Mr. Chitwa, instructed by DC. Chitwah & Company, Advocates, for the administrators.

