



REPUBLIC OF KENYA



In re Estate of Makaka Peter Machuru (Deceased) (Succession Cause 608 of 2013) [2022] KEHC 12280 (KLR) (19 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 608 OF 2013**

PJO OTIENO, J

AUGUST 19, 2022

IN THE MATTER OF THE ESTATE OF MAKAKA PETER MACHURU (DECEASED)

BETWEEN

SELINA JEMIZIKI ROBPETITIONER/RESPONDENT

VERSUS

FLORENCE AKOLA LING'ONDO ...OBJECTOR/APPLICANT

RULING

1. There are before Court for determination two applications dated 29.7.2015 and 20.7.2016 seeking revocation of the grant and confirmation respectively. Both applications were resisted by the Administrator by her Replying Affidavit sworn on 24.5.2016 and Affidavit of Protest sworn on the 4.10.2021.
2. While those applications were pending resolution on 9.10.2018 there was a consent by the parties that the County Surveyor visits their land and carries out the survey based on the existing boundaries, in the presence of the parties and that the costs be met by the Administrator. That consent was recorded in the presence of Counsel for the parties and evidently demonstrates that parties were keen not to litigate the two applications and to share the land on the ground based on the existing occupation and user by the parties.
3. Despite such consent as adopted by the Court, having been implemented by the Surveyor visiting the site and filing a report on 11.6.2020, when the matter was in Court on the 7.6.2021 Counsel informed the Court that purpose of the mention was to fix a hearing date and the focus then shifted from the consent to hearing the objection without mention of the pending protest and the consent
4. However, when the two Counsel attend before Court on 25.7.2022, Counsel for the Petitioner informed the Court that even though the matter was listed for hearing, such would be unnecessary when the file is perused and understood well. He then drew the Court's attention to the consent of



- 9.10.2018 and the report filed in Court on 9.9.2021. To Counsel, the report speaks to how the land is occupied and used on the ground and that should be the basis to distribute and share it out.
5. However, the Objector's Counsel took the view that even though the survey report had been so filed and was addressing the issues it was to address, there were people who were on the land and occupying same without being beneficiaries nor buyers.
 6. The Court thus asked the Counsel to address the question of whether or not there was the jurisdiction in the Court to determine the dispute by people who are not beneficiaries to the estate.
 7. In answering that task the Petitioner's Counsel told the Court that, in his life, the deceased sired a son and a daughter with two different women. That the petitioner is the mother to the daughter while the Objector is the widow to the son who has since died.
 8. He added that prior to his death the deceased had sold portions of the land to four different buyers, settled them on distinct portions of the land just as he shared out distinct portions occupied by the Petitioner and the Objector. To counsel, it was on that basis that each party knows and continues to occupy portions of the land as they did as at the date of the deceased's death; that the consent to have the land surveyed was purposed to establish what each party occupies and should get. He underscored the fact that the Court order was extracted by the Objector's Counsel and served upon the County Surveyor in the absence of the parties as an indication that the consent was consensual and intended to be binding upon the parties hence the Objector should not be seen to resile from it. He added that it is the survey report which forms the basis of the application for confirmation and that none of the parties dispute the accuracy of the survey report. He then submitted that some of the agreements go back to the year 1988 and that by dint of Section 2 and 47 of the [Law of Succession Act](#), the Court has a wide latitude to make orders which meet the ends of justice so that parties are saved the agony of being tossed from one Court to the other.
 9. Counsel cited to Court the decision in Re Estate of Joseph Mutua Mungugu for the proposition that claims by purchasers from the deceased are addressed at the point of confirmation without the need to go to the Environment and Land Court. The decisions in [Mpatuega Ole Kamunye –vs- Melio Tipango](#) [2017] eKLR and Titus Maragori Waruthe –vs- Naomi Wanjiru Wachira were cited for the proposition that distribution is done of the net estate and that so long as one demonstrates having brought from the deceased, he becomes a creditor to the estate.
 10. Counsel for the Objector on his part agreed with the position of the Petitioner that liabilities must be settled before distribution but contended that here, not all named persons purchased from the deceased hence the need to take evidence on when the alleged purchases took place. He however declined to comment on the consent recorded in Court on the basis that no background was given how it was negotiated.
 11. In my analysis, I find that while the petitioner, as the widow to the deceased asserts that all the four named liabilities purchased from the deceased, the Objector does nothing more than allege doubt as to the truthfulness of the assertion. I did ask the Objector's son if the named purchasers were on the land at the time the deceased died and he answered in the affirmative. I have perused the Petition herein and the introductory letter from the area Chief dated 5/8/2013, just fourteen (14) months after the death of the deceased and noted that the four persons were clearly identified as liabilities and parties interested in the estate. I find and hold that the named liabilities are indeed liabilities of the estate and must be taken into account in the administration so that if not discharged or dischargeable prior to distribution must be satisfied at the point of distribution. Being liabilities as purchasers for the deceased, their claim is the kind a probate Court must determine and deal with. I therefore find that the Court is properly



clothed with power to determine if the four were liabilities to the estate and do determine that issue in the affirmative.

12. Having found that Ernest Anyanda Shipwoni, Petronilla Atamba Shivachi, Peter Shikanga Shipwoni And Ruth Ajema Milimu are purchasers from the deceased of definite and delineated portions of land they occupy todate, I determine that they are entitled to those portions in discharge of their claim as liabilities to the estate.
13. In addition Selina Jemiziki Rob, Wilfrida Khalionwa Ling'ondo and Florence Ling'ondo, are agreed to be the beneficiaries of the estate being the widow, daughter and daughter in law respectively. The widow and daughter shall get their shares in the estate as of right while the daughter in law shall take the share of her husband, a son, who predeceased the deceased herein. Those I find to be the persons entitled to get shares in the estate.
14. On what portion each would get, the Court appreciates the nature of a consent order to be a contract. Accordingly the consent recorded in Court on 9.10.2018 by Counsel for both sides, which has not been challenged, gave the formula for distribution to be how the persons entitled have occupied and put the land to use since the death of the deceased. That occupation and user has been professionally verified and captured in the Surveyor's Report dated 11.6.2020 filed in Court on the 10.9.2020. The capture of each person's holding and occupation on the ground was disclosed to be:-
 - Selina Jemisiki Rob 0.08 Ha.
 - Florence Ling'ondo 0.08 Ha.
 - Ruth Ajema Milimu 0.16 Ha.
 - Peter Shikanga Shipwoni 0.18 Ha.
 - Petronilla Atamba Shivachi 0.17 Ha.
 - Jeniffer Anyanda Shipwoni 0.19 Ha.
15. I do find the six named person being entitled to the portions they occupy and have been occupying since demise of the deceased shall share the estate in that ratio. In that scheme of things, the share due to the widow shall be what her daughter shares from the estate. Therefore, the Grant of Letters of Administrate Intestate issued to the Petitioner on the 10.12.2013 is confirmed and the estate distributed as captured by the Surveyor's report aforesaid.
16. Let the Certificate of Confirmation of Grant issue forthwith to enable the Administrator to transmit the shares due to the named persons within ninety (90) days from today.
17. Any necessary survey fees and attendant expenses and costs shall be shared equally between the six persons.
18. Mention on 16.12.2022 to confirm that administration shall have been completed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF AUGUST 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Mulama for Shifwoka for the Petitioner/Respondent

No appearance for Kombwayo for the Applicant/Objector



Court Assistant: Kulubi

