



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Omukenya Shirotso (Deceased) (Succession Cause
257 of 2004) [2022] KEHC 16904 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 257 OF 2004
WM MUSYOKA, J
DECEMBER 23, 2022**

RULING

1. The deceased herein died on June 7, 1985. Representation to his estate was sought in this cause by John Ogola Mukenya, in his capacity as son. He listed himself and Charles Odhiambo Mukenya as the survivors of the deceased. The deceased was said to have died possessed of Butsotso/Ingotse/154. A grant was made to him on March 22, 2005. That initial administrator died and was substituted by his, Julius Omondi Ogola, and a grant was made to him on December 8, 2010. I shall refer to Julius Omondi Ogola as the administrator.
2. The administrator filed summons for confirmation of grant on July 14, 2011. He identified himself as the sole survivor of the deceased. He proposed that Butsotso/Ingotse/154 devolve wholly upon himself. That application attracted a protest from Ernest Mangala Anyuga, claiming a purchaser's interest in Butsotso/Ingotse/154.
3. Oral evidence was taken on the protest. A judgment was delivered on February 25, 2016. The court ruled it had no jurisdiction to decide on whether the protestor had acquired an interest in Butsotso/Ingotse/154 by way of sale, and held that that jurisdiction lay with Environment and Land Court. The summons for confirmation of grant was held in abeyance to enable the protestor move the Environment and Land Court, if he was so minded.
4. The record reflects that the protestor did move the Environment and Land Court, in Kakamega ELC No 83 of 2016, claiming entitlement to Butsotso/Ingotse/154, not on grounds of having bought it, but on basis of adverse possession. The Environment and Land Court ruled, on March 22, 2022, that adverse possession was not proved, and dismissed the suit.
5. On May 23, 2022, the matter was placed before me for revival of the summons for confirmation of grant. Julius Omondi Ogola, Morris Otieno Odhiambo, Patrick Odhiambo Ogola, Jacob Ogola, Maureen Akinyi, Ernest Ayugi and Christopher Owodhi Owino. The administrator, Julius Omondi Ogola, informed the court that the deceased was his grandfather, and that the family had sat and agreed on distribution, as per a further affidavit of April 5, 2022. The deceased was said to have had 2 wives. One wife had 1 son and 2 daughters; while the other had 2 sons and 1 daughter. I was only given



the names of the sons. Charles Odhiambo Ogola, the late John Ogola Muganya and the late Samson Ochieng Muganya. I was informed that the late John Ogola Muganya had 6 sons, 2 of whom died young. He also had an unspecified number of daughters. They were said to have died young. I was told Pamela Ogola was survived by a Beatrice Akinyi. The 6 sons of the late John Ogola Muganya, were said to be Julius Omondi, Maurice Otieno, Pius Onyango Juma, Patrick Otieno Ogola, Jacob Ogola, the late Samson Ochieng Muganya had only 1 child, Maureen Akinyi Owino. He stated that the estate would take 0.3Ha; Christopher Omondi and the estate of Samson Ochieng Muganya were to get 0.14Ha. Julius Odhiambo, Christopher Owino and Ernest Mungala were described as buyers, and were to take 0.7Ha, 0.7Ha and 0.2 Ha, respectively. I was informed that Beatrice Akinyi should get a share out of the 0.3Ha meant for the estate of John Ogola.

6. Morris Otieno Odhiambo, Patrick Omondi, Jacob Ogola, Maureen Akinyi, Ernest Ayangi, Christopher Owino and Beatrice Akinyi were paraded, in compliance with rule 41(1) of the *Probate and Administration Rule*, for me to hear their views, which I did. That is reflected on the record.
7. The further affidavit of April 5, 2022, principally places on record the judgment in Kakamega ELCC No 83 of 2016. But it also proposes a mode of distribution, different from that in the affidavit of September 2, 2011, where the administrator proposed to take the whole of Butsotso/Ingotse/154. It is proposed that Charles Odhiambo Muganya and Maureen Akinyi take 0.14Ha, Julius Omondi Ogola, Christopher Owuoth Owino and Ernest Mangala Ayugi take 0.07 Ha, 0.07Ha and 0.20Ha, respectively, and Julius Omondi Ogola, Morris Otieno Ogola, Pius Onyango Juma, Gerald Odhiambo Ogola, Tony Otieno Ogola and Jacob Ogola 0.30Ha.
8. The proviso to section 71(2) of the *Law of Succession Act*, cap 160, Laws of Kenya, and rule 40(4) of the *Probate and Administration Rule*, require that the administrator satisfy the court that persons beneficially entitled to a share in the estate have been ascertained, and their shares too. Have these provisions been complied with? The said provisions states as follows: -

“71(2) The court to which application is made, or to which any dispute in respect thereof is referred, may—

- (a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or
- (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or
- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”



“40(4) where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.”

9. The disclosures of the persons beneficially entitled to a share in the estate herein has been done in small doses. In the petition, the deceased was said to have been survived by 2 sons. In the confirmation application, the number of survivors reduced to 1 grandson. In the affidavit of April 5, 2022 the number ballooned to 11. At the court affidavit on May 23, 2022, more critical disclosures were made. It emerged that the deceased was a polygamist, who had married 2 wives. He had children with both wives. The names of the sons were disclosed but not of the daughters. On the face of it, the administrator has not complied with the proviso to section 71(2) and rule 40(4).
10. The law requires, in the 2 provisions, that the shares, due to the survivors or beneficiaries who have been ascertained, be ascertained too. I have stated that the administrator has not properly identified all the members of the family of the deceased, both male and female, as the law makes no distinction, and does not see the children of the deceased in terms of their gender. To the extent that there has been no proper ascertainment of the beneficiaries, it cannot be said that the shares due to them have been ascertained.
11. Where the intestate died a polygamist, like in this case, the estate is distributed in accordance with section 40 of the [Law of Succession Act](#). That law requires that the property be shared out between the houses, taking into account the number of children in each house. What is devolved to each house is thereafter distributed in that house or amongst members of the house dependent on the composition of each house. There was no disclosure on whether the wives of the deceased are alive or dead, and I shall presume that they have all died, and, therefore, section 35 of the [Law of Succession Act](#), would not apply in the distribution. It would appear that only the children survived, and therefore, what shall devolve to each house shall thereafter be distributed equally amongst the children in each house, according to section 38 of the [Law of Succession Act](#).
12. Section 38 and 40 of the [Law of Succession Act](#) provide as follows;
 - “ 38 Where intestate has left a surviving child or children but no spouse
Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”
 - “40. Where intestate was polygamous
 - (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.”
13. Some of the sons and daughters of the deceased are dead. It is indicated that some were survived by children. Section 41 states what happens when a child of the deceased dies. The share due to that dead child of the deceased devolves upon the children of such dead child of the deceased, and such children,



being grandchildren of the deceased, step into the shoes of their dead parents. It is called representation or substitution. It is provided for in section 41 of the *Law of Succession Act*, which provides as follows:

“...for or any of the issue of any child of the intestate 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.”

14. I cannot distribute the estate of the deceased herein prior to the administrator placing before me material that would enable me exercise discretion in terms of sections 38, 40 and 41 of the *Law of Succession Act*.
15. 3 of the persons to whom it is proposed that the land be devolved to are not children of the deceased. They are said to be buyers of estate land. It is not does disclosed from whom the land was bought and when, and no documentation was availed to support that. I raise this, as at confirmation the only buyers or creditors that the court will allow and provide for are those who transacted with the deceased. The administrator is obliged to indicate whether the 3 alleged buyers bought the land from the deceased before he died or not. If they bought from the deceased, then documented proof must be provided. If they bought the property after the deceased died, then the administrator should provide proof of where he got the authority to sell land registered in the name of a dead person before the grant was confirmed, failing which the buyers should look up to the person who sold the land after the deceased had died. Buyers of land belonging to a dead owner, before confirmation of a grant, and without leave of court, are not beneficiaries of the estate, and they are not entitled to be allocated anything at a confirmation.
16. The law on all this is sections 79 and 82 of the *Law of Succession Act* section 79 vests the assets of the estate of an intestate in the administrator. Section 82 sets out the powers of an administrator. These are the powers that are exercisable by the person to whom the assets of the estate have been vested under section 79, and they include the power to sell estate assets. The administrator has power to sell estate assets, since they vest in him as legal owner, subject to trust. However, the power of sale is limited by section 82(b)(ii), with respect to immovable assets of the estate, which cannot be sold before the grant is confirmed. Sections 79 and 82(b)(ii) state as follows: -

“

“79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

“80. When grant takes effect

(1)...

- (2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) ...



- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that –

- (i) ...
- (ii) no immovable property shall be sold before confirmation of the grant.”

17. Section 45 of the *Law of Succession* is also relevant. It covers situations relating to handling of assets of the dead person. No one is entitled to deal with the said assets as if they belong to them. The mere fact that one is a spouse or child of the deceased does not qualify them to begin handling estate assets if they belonged to them. Such persons cannot, on the basis that the deceased was their husband or wife or parent, just move in and take possession of assets of a dead person, lease it out or gift or sell. The law envisages that once the owner of property dies, due process must follow. Up to 4 persons are to be vested with such property, under sections 58 and 79 of the *Law of Succession Act*, and only such persons are to deal with the assets of the deceased as owner. Section 45 declares that a person who has not been appointed an administrator of the estate should not handle estate assets, as he would have no authority to do so, it makes it an offence to handle such property, punishable by a fine or imprisonment or both. Section 45 states as follows; -

“ 45. No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

18. I believe I have said enough to demonstrate that the administrator has not properly ascertained the persons beneficially entitled to a share in the estate and their respective shares. Consequently, I shall make the following orders, and give the following directions: -

- (a) That I hereby postpone determination of the application dated July 14, 2011 to await clarification of the various issues raised above;
- (b) That the administrator to file a further affidavit to disclose the following: -
 - (i) all the children of the deceased, grouped according to the 2 houses;
 - (ii) the disclosure shall be of both sons and daughters, whether alive or dead;
 - (iii) for any dead children, display their certificate of death, and list their children, whether male or female’;



- (iv) disclose all the persons, who are not family members, who have a claim against the estate, either as purchasers or buyers or creditors; and
- (v) the disclosures in respect of (iv) above, to be supported by documents, and should indicate from whom the property was bought and when the sale happened;
- (c) That the further affidavit shall be filed in the next 45 days; and
- (d) That the matter shall be mentioned on a date to be allocated at the delivery of this ruling, for the purpose of compliance, mentioning and further directions.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23rd DAY OF December 2022

W M MUSYOKA

JUDGE

Erick Zalo, Court Assistant.

Julius Omondi Ogola, Administrator.

