In re Shadrack Oichoe Oisebe (Deceased) (Succession Cause 30 of 2014) [2022] KEHC 18051 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 18051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

SUCCESSION CAUSE 30 OF 2014

REA OUGO, J

DECEMBER 21, 2022

IN THE MATTER OF THE ESTATE OF SHADRACK OICHOE OISEBE (DECEASED)

AND

IN THE MATTER OF CONFIRMATION OF GRANT OF LETTERS OF ADMINISTRATION INTESTATE

BETWEEN

JOE OICHOE OISEBE .... PETITIONER

AND

BILLIAH BOSIBORI OISEBE .... OBJECTOR

RULING

1. The Joe Oichoe Oisebe and Billiah Bosibori Oisebe herein were appointed as the administrators of the estate of Shadrack Oichoe Oisebe (deceased). For purpose of this ruling, I shall refer to Joe Oichoe Oisebe as the petitioner and Billiah Bosibori Oisebe as the objector. According to the parties the deceased was the proprietor of parcel Lr No Wanjare/Bogiakumu/1001 ('parcel no 1001'), Kisii Municipality Block 111/36 ('parcel No 36') and Lr Gesima Settlement Scheme/234 ('parcel No 234').
2. Subsequently, the petitioner filed summons seeking to have the grant confirmed. He listed the deceased's beneficiaries in his supporting affidavit as Joe Oichoe Oisebe, Margaret Oichoe, Tom Oichoe, Florence Oichoe, Mary Maico and Bilia Bosibori. He proposed that Kisii Municipality Block 111/36 be shared between all of the deceased beneficiaries with the exception of the objector.
3. The objector filed an affidavit of protest. She alleged that she was not notified of the application despite being a co-administrator and did not append her signature to the proposed schedule of distribution annexed in the petitioner's summons for confirmation of grant. She averred that parcel no 36 does not

belong to the deceased but her husband Sweney Manase Oisebe (now deceased). She explained that her husband acquired the land but chose to have it registered in the deceased's name. They developed commercial premises on the land and have diligently paid rates and rent in respect of the property.

4. As regards parcel no 1001, the objector alleged that the petitioner has already caused the same to be sub-divided into Lr Nos Wanjare/ Bogiakumu/4488 and Lr Nos Wanjare/ Bogiakumu/4489. He then sold parcel 4489 to a third party and further sub-divided parcel 4488 into Lr Nos Wanjare/ Bogiakumu/4417 and Lr Nos Wanjare/ Bogiakumu/4418 which have also been sold. Therefore, the proposed schedule of distribution has been made in futility with the intention to mislead the court.

5. Shortly thereafter, the objector also filed summons for confirmation of grant. According to her application, parcel No 1001 is the only property the deceased had. She therefore seeks the cancellation of Lr Nos Wanjare/ Bogiakumu/4488, 4489, 4917 and 4918. Alternatively, she seeks that the petitioner be directed to tender accounts pertaining to the proceeds from the sale of parcel 1001. She proposed that parcel 1001 be shared equally between the deceased's beneficiaries and while she should hold parcel Lr No Kisii Municipality/Block III/36 in trust for herself and her children.

6. The petitioner herein filed a response to the objector's application to have the grant confirmed. He averred that at the time of the deceased's death parcel Nos 36, 1001 and 254 were registered in the deceased's names and that the estate of the deceased comprise of the 3 properties. He urged the court to take into account that all the rental income from parcelNo 36 has been collected by the objector at the exclusion of all other beneficiaries. The objector should also tender account on the rental income from the property.

7. The objector in her further replying affidavit maintained that parcel No 234 was acquired and registered in her husband's name. In any event, the petitioner mounted a suit against her regarding the ownership of the parcel and his suit was dismissed.

8. The matter proceeded by way of oral evidence. Billiah Bosibori Oisebe (Pw1) testified that the deceased was the father of her husband Swney Manase Oisebe. She adopted her witness statement dated March 22, 2021 as her evidence in chief. Pw1's statement merely reiterates her case as per her affidavits filed before the court. She testified that she used to live in parcel No 1001 which belonged to the deceased. On cross examination she testified that parcel No 36 is not the deceased's property. She testified that her deceased husband built on the land and that she receives rent from the said house.

9. Jane Kerubo Oisebe (Pw2) testified that Pw1 is her mother and therefore she is the deceased's grandchild. She adopted her statement dated March 22, 2021 as her evidence in chief. She testified that parcel No 36 was acquired by Sweney Manase Oisebe who was a senior civil servant and was therefore not allowed to register and/or own property in his name. On the other hand, the deceased was not engaged in any meaningful activity and could have not purchased parcel 36. On cross examination she testified that the deceased held the flats constructed on parcel no 36 in trust for Sweney Manase Oisebe. She testified that parcel No 1001 was ancestral land that was fraudulently transferred by the objector.

10. James Bosire Mokua (Pw3) testified that Sweney Manase Oisebe was his cousin. He currently resides in one of the houses that were constructed by Sweney Manase Oisebe on parcelNo 36. He also testified that parcel No 1001 constituted ancestral land and was disposed by the petitioner to disinherit the deceased's lawful beneficiaries. He testified on cross examination that Sweney Manasseh Oisebe after building on the land asked him to take care of the property and he has been living there for the last 47 years.

11. The Joe Oichoe Oisebe (Dw1) testified that there are 2 properties under succession. He explained the objector intermeddled with parcel No 234. In regards to parcel no 1001, he testified that entered into

sale agreements with buyers who processed the titles. He testified that although the objector argues that her husband purchased and developed parcel No 36, there was no evidence tendered to support her claim. He testified that after the deceased died, Sweney Manese Oisebe was not keen to claim the property and did not institute any succession proceedings to claim the property. He also told court that the argument that civil servants could not have properties in their name is a lie. On cross examination he testified that he dealt with parcel No 1001. Parcel No 234 was subject of ELC 385/2014 where he was the plaintiff and the matter was struck out. He did not prefer any appeal. He maintained parcel No 36 forms part of the deceased's estate. He testified that the deceased was an artisan, he also grew tea, pyrethrum and did dairy farming.

12. Margaret Oichoe (Dw2) testified that she is the first born in the deceased's family. She testified that parcel No 36 was allocated to the deceased and he put up 4 residential flats as per the conditions set out in the allotment documents. The deceased gifted the petitioner parcel No 1001 during his lifetime. She testified that the ancestral land is Wanjare/ Bogiakumu/1213. The deceased owed parcel 234 which was stolen by the objector. On cross examination they testified that the objector has been collecting rent from the flats since they were built since 1974.

Submissions By Parties

13. The objector in her submissions argued that although parcel 1001 was in the deceased's name, the same has been transferred illegally transferred to third parties. Section 82 (b) (ii) of the *Law of Succession Act* provides that no immovable property shall be sold before confirmation of grant. The petitioner's action thus amounted to intermeddling. Regarding ownership of parcel no 36, they submitted that the land was acquired and developed by the deceased who paid all land rates and rents. Although it was registered in the deceased's name, he held it in trust for his son Sweney Manase Oisebe. They relied on the holding of the Court of Appeal in *Charles K. Kandie v Mary Kimoi Sang* [2017] eKLR:

> " 14. It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence.....
>
> 15. In the *Twalib Hatayan case* (supra) which was cited by the appellant, this court examined and stated the law on trusts as follows:-
>
> "According to the *Black's Law Dictionary*, 9th Edition; a trust is defined as
>
> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
>
> Under the *Trustee Act*, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."
>
> In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black's Law Dictionary*) (supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will

impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see *Halsbury's Laws of England* supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. .....

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see *Black's Law Dictionary*) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See *Snell's Equity*29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see *Snell's Equity* at p.177) (supra). (Emphasis added).

16. Applying the emphasized portions to the case before us, it is clear that as between Mzee Chepkoros and the deceased, there was no constructive trust since Mzee Chepkoros did not acquire the property by wrongdoing and no unjust enrichment arises. On the evidence, the name of Mzee Chepkoros was used to acquire the disputed land since the deceased could not use his own name as he was in the civil service. That assertion was made on oath and there was no rebuttal. Until his death, Mzee Chepkoros did not raise any issue with his son over the disputed land. Furthermore, there is no evidence that Mzee Chepkoros settled on the land and if so the nature of the settlement. It is asserted on the contrary that he had his own land in Solai....."

14. The petitioner in his submissions argued that parcel no 1001 was sold after consultation with other beneficiaries and out of necessity so that he could raise money to mount a suit against the objector relating to the acquisition of parcel no 234. They relied on the case of *Re Estate of Charles Njeru Murua Tetu (Deceased)* [2021] eKLR where the court held that:

" 19. As such, in my view, despite the estate having not been formally distributed, David's share of the estate cannot be said to have been unidentified. The same was identifiable. David Kivuti's share is indicated to be 2 acres including the homestead. From the evidence presented before this court, the car-wash is in the homestead. It is thus clear that the deceased beneficiary sold a plot from where he was to get his share from. That being the case, the respondent lawfully occupies the said part of the estate. He is therefore not an intermeddler or stranger to the said portion. The deceased's beneficiary's share being identifiable, he had a right to sell the said part."

15. It was submitted that the objector failed to tender evidence that her husband paid for the acquisition and development of parcel 36. She also failed to avail the policy which hindered civil servants from

registering property in their name. Sweney Manase Oisebe acted as the deceased's agent in the management of parcel No 36.

Anlysis And Determination

16. I have considered the pleadings and the submissions by parties and the most pertinent issue before the court is the identity of the deceased's properties that are available for distribution.

17. It is not in dispute that parcel no 234 was the subject of litigation in *Joel Oichoe Osebe v Agriculture, Fisheries and Food Authority & 9 others* [2017] eKLR where the petitioner sued the various parties including the objector on allegations that the land was transferred to the objector's husband fraudulently. The Land and Environment Court disposed of the matter in its ruling dated May 12, 2017. The court struck out the petitioner's suit on account that the suit was statute barred by reason of having been filed outside the limitation period. The issues raised in the plaint were not considered; therefore Sweney Manase Oisebe's ownership of parcel 234 was not challenged. The parcel does not form part of the deceased's property.

18. The objector has made arguments on her husband's ownership of parcel No 36 on account of a trust. She extensively relied on the Court of Appeal in *Charles K. Kandie v Mary Kimoi Sang* (supra). While I recognize the principal of stare decisis, making the decision of the Court of Appeal binding on this court, there is no doubt that the law on this issue has since evolved. The decision in the *Charles K. Kandie case* (supra) relates to the high court decision that was made on April 27, 2010 before the promulgation of the *Constitution* of Kenya 2010. After the promulgation of the *Constitution* on August 27, 2010, there were established specialized courts such as the land and environment court tasked to deal with matters touching on ownership of land. Secondly, the mandate of the probate court under the *Law of Succession Act* is limited as it does not provide convenient mechanisms on issues touching on ownership of property and trust. Musyoka J in *Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, observed that:

> " Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the *Law of Succession Act* is limited. It does not extend to determining issues of ownership of property and declaration of trusts (emphasize added). It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the *Law of Succession Act* and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.
>
> Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietory interest on land based on the alleged trust. In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court."

19. Similarly, in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR it was held as follows:

> " .....The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and

preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and rules, which have elaborate rules on suits by and against executors and administrators (emphasize added).

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned (emphasize added). The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court (emphasize added). The interventions by that court are limited to what I have stated above."

20. The determination of existence of a trust is therefore a matter that should be before the Environment and Land Court. At this juncture, I shall not make any finding on the distribution of parcel No 36 until a order from the Environment and Land Court is presented before the court on the true ownership of parcel No 36.

21. It is not in dispute that parcel No 1001 has already been sold by the petitioner. It is also not in dispute that the land was sold by the petitioner in his capacity as an administrator. The objector argues that he sold the property without the grant being confirmed and that therefore his actions amounted to intermeddling. For avoidance of doubt, section 45 of the *Law of succession Act* reads 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."

22. Although, the petitioner was the appointed administrator while disposing off the deceased's property, he was in breach of the provisions of section 82 (b) (ii) of the *Law of Succession Act* which provides as follows:

82. Powers of personal representatives

Personal representatives shall have the following duties-

(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-

(ii) no immovable property shall be sold before confirmation of grant."

23. In *re Estate of Zacheaus Sumani Kadagale - Deceased* [2021] eKLR the court held that:

14. It is also clear that the only property of the deceased, Nyangori/ Gemalenga/289, has illegally been sold. The first applicant claims her husband, Eric, had purchased the land from Aineah Malande, a brother to the deceased. The administratrix claims that she is the one who purchased the land from the said Aineah. All these alleged transactions were done before the grant was made or confirmed, which by itself was an illegality under the *Law of Succession Act*.

15. .....

16. Section 82 (b) (ii) of the Act outlaws sale of immovable property of the estate before a grant has been confirmed. The provision says: "No immovable property shall be sold before confirmation of the grant." The court had to deal with that in *Virginia Mwari Thuranira v Purity Nkirote Thuranira* [2017] eKLR (Gikonyo J), where it said:

"As for the assertion that the respondents mother sold 1 ½ acres of land to Elias Mugambi Mwongera, I have this to say. The said sale agreement is null and void for violating section 82 (b) (ii) of the *Law of Succession Act*, as the said Julia Thuranira had not obtained letters administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court…Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity."

17. By virtue of these provisions and the judicial pronouncement in *Virginia Mwari Thuranira v Purity Nkirote Thuranira* [2017] eKLR (Gikonyo J), with respect to such sales, the sale transactions relating to Nyangori/ Gemalenga/289 were null and void, as the same were done before representation had been granted to the estate. However, this being a succession court whose mandate is limited to the ascertainment of beneficiaries and assets of the deceased, I cannot proceed to deal with issue of ownership of land, as the same is a reserve of the Environment and Land Court and the magistrate's court with jurisdiction over land matters, and, therefore, the same should be addressed in that court.

24. The explanation by the petitioner is that he sold parcel no 1001 so that he could raise fund to prosecute a suit. However in my view, the petitioner did not have any powers to sell parcel No 1001 as grant of

representation intestate had not been confirmed. The sale was therefore illegal. The objector contends that parcel No 1001 was the deceased's land, however, any contestation touching on the ownership of the land should be made before the Environment and Land Court and all the parties to the dispute, including the third parties be given an opportunity to defend the suit.

25. In the end, although the parties herein have made applications to have the grant confirmed, the deceased's assets are yet to be ascertained. The application for confirmation of grant cannot be determined until the issue of ownership of the 2 parcels of land is determined. Matter to be mentioned before the Judge for further directions on the February 8, 2023.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS AT BUNGOMA THIS 21ST DAY OF DECEMBER 2022.

R.E.OUGO

JUDGE

In the presence of:

For the Petitioners

For the Objector

Wilkister/ C/A