



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 863 OF 2011**

**IN THE MATTER OF THE ESTATE OF ROBERT OKIYA SINO (DECEASED)**

**RULING**

1. The cause herein relates to the estate of Robert Okiya Sino who died on 27<sup>th</sup> March 1993. According to a letter from the Chief of North Marama Location, dated 26<sup>th</sup> October 2011, the deceased was survived by seven individuals listed in the letter, but whose actual relationship with the deceased was not disclosed. The seven are Rose Nakwe Ndombi, Selina Nandwa Olukwa, Eria Okwomi Robert Okiya, Morris Aura Robert, Thomas Robert Sino, Robert Okiya Sino and Simeon Okiya Ogola. It was indicated in the letter that the deceased died possessed of a property known as Marama/Shiraha/601.

2. Representation to the estate was sought in this cause vide a petition that was lodged herein by Simeon Okiya Ogola in his purported capacity as son of the deceased. I shall hereafter refer to him as the petitioner. In the affidavit sworn in support of the petition by the petitioner, the deceased was expressed to have been survived by the individuals named in the Chief's letter that I have referred to above. They were described as sons and daughters of the deceased. He was also expressed to have died possessed of Marama/Shiraha/601. There is also on record a document in the form of consent to letters of administration being granted to the petitioner. The consent is executed by the individuals listed in the Chief's letter.

3. There is nothing on record to indicate whether or not the cause was ever gazetted as envisaged by section 67 of the Law of Succession Act, Cap 160, Laws of Kenya, but an objection dated 1<sup>st</sup> August 2012 was lodged herein on 2<sup>nd</sup> August 2012, by Joseph Onyango Sino, Abraham Sino, Habil Sino, Tabith Odinga and Truphena Jimba, who I shall refer to hereafter as the objectors, principally on grounds that their consents had not been obtained, some beneficiaries had been left out and that the petitioner was intermeddling with the estate. The objection was followed up by a petition by way of cross-application for grant under Rule 17(5) of the Probate and Administration Rules, dated 15<sup>th</sup> August 2012. An answer to the petition was filed on 15<sup>th</sup> August 2012, by the objectors, bearing the date of 15<sup>th</sup> August 2012. .

4. In the intervening period several interlocutory applications were filed. There was a chamber summons dated 3<sup>rd</sup> May 2012 filed by the petitioner against Habil Sino Omutindi, one of the objectors. Interim orders were made herein on 7<sup>th</sup> May 2012 restraining the said objector from intermeddling with the estate. Another chamber summons, dated 25<sup>th</sup> February 2014, was lodged by the objectors seeking to restrain the petitioner from committing waste on 1.2 acres of Marama/Shiraha/601. Interim orders were made on that application on 28<sup>th</sup> June 2012.

5. I have seen the affidavit sworn by the applicant on 16<sup>th</sup> May 2012 in response to the application dated 3<sup>rd</sup> May 2012. I have also seen an affidavit that the petitioner swore on 21<sup>st</sup> July 2014. It titled replying affidavit, although it gives no indication of what it was replying to. I suppose it was a reply to the application dated 3<sup>rd</sup> May 2012. In it he avers that objectors were claiming that Marama/Shiraha/603 was the land given to them by their late father Gamaliel Omulindi Sino. He avers that the objectors stay on Marama/Shiraha/603, while he stayed on Marama/Shiraha/601, which had been given to him by his father, the deceased person the subject of these proceedings. It avers that it was because Marama/Shiraha/601 belonged to the deceased that he had brought the succession proceedings. He avers that he was cultivating the land together with his siblings Elias Okuomi, Maurice Aura, Thomas Sino and Robert Okiya Sino. It is after his brother Sedekia Ohume died that the objectors moved into Marama/Shiraha/601 in 1972. He stated that it was on that account that he had obtained injunctive orders.

6. The application that I am called upon to determine is a chamber summons dated 18<sup>th</sup> April 2017. It is at the instance of Habil Sino, one of the objectors. I shall refer to him henceforth as the applicant. He seeks that the objection proceedings and all the pending applications should be deemed as abandoned, that grant of letters of administration intestate be made jointly to him and the petitioner, that the *status quo* regarding the occupation of the disputed 1.2 acres in Marama/Shiraha/601 be maintained, that the petitioner do file a summons for confirmation of the grant to be made to them and in default Habil Sino do file one, and that any person who shall not agree with the proposed distribution be at liberty to file affidavits of protest. His case is that the objection proceedings did not address the issue in dispute which was the interests of the objectors in the 1.2 acres in Marama/Shiraha/601. He took the view that that issue could only be dealt with at confirmation of the grant.

7. The petitioner responded to the application through an affidavit sworn on 19<sup>th</sup> April 2017 and filed herein on even date. He asserts that Marama/Shiraha/601 was registered in the name of the deceased, and that the applicant, who was his cousin, was not entitled to a portion of it given that he had been given his own share of his father's land by his deceased father. He states that joint administration should not be granted to him and the applicant since the applicant was not a survivor of the deceased. He blames the applicant for the delay in the finalization of the matter. He states that their grandfather died after he had already distributed his property amongst his sons. He asserts that the late father of the applicant had been given his own property which he then shared out amongst his children. He asserts that the applicant was not entitled to a share of Marama/Shiraha/601 as his father had given him Marama/Shiraha/603.

8. The application came up for hearing on 4<sup>th</sup> November 2019. It was urged orally, by Ms. Sijenje for the applicant, and the petitioner in person. Both sides breathed life to the averments made in the affidavits on record.

9. The state of affairs with regard to administration of the estate of the deceased herein is quite unfortunate. The deceased died in 1993. Representation to his estate was not sought until 2011, nearly twenty years after his demise. Since 2011 when the petition for representation was lodged herein representation has not been made due to pendency of objection proceedings and injunctions obtained through numerous interlocutory applications.

10. The objection proceedings were lodged in 2012 and have not been disposed of to date. I have perused through the record and noted that directions have never been taken on the disposal of the said proceedings. The blame for that lies with the court registry. According to Rule 17(6) of the Probate and Administration Rules, once an answer to the petition and a petition by way of cross-application has been filed it is the responsibility of the Deputy Registrar to cause the matter to be placed before the Judge for directions. The matter has lain in limbo since 2012 because the Deputy Registrar has not taken steps to comply with Rule 17(6). Of course, there must be some blame to be placed at the doorstep of the objectors. Upon the failure by the Deputy Registrar to act in terms of Rule 17(6), the objectors should have taken the initiative themselves by causing the matter to be listed for directions so as to fast-track it. It is unacceptable for the objectors to have just sat back and waited.

11. So much time has elapsed between 2012 and now. The estate of a person who died in 1993 has remained unadministered since then. It is critical that the matter be fast-tracked, and I would agree with the spirit of the applicant that the objection proceedings ought to be abandoned so as to pave way for appointment of administrators and thereafter distribution of the assets. Skirmishes over who should utilize which property pending distribution only serve to delay finalization of the matter.

12. The primary object of a succession or probate cause is distribution of the assets. The cause is initiated to facilitate transition of the assets from the name of the deceased to his or her survivors. That is the ultimate goal. Sometimes, however, the parties get consumed in fights which only serve to subvert that primary objective.

13. Objection proceedings come at the early stages of the life of a succession cause. The objective of these proceedings is to determine questions on who is best suited for appointment as personal representative of the deceased. The ultimate outcome of the objection proceedings should be appointment of personal representatives. It is not about determining who the rightful heirs are, or who is beneficially entitled to a share in the estate, or for identifying the debts or liabilities of the estate, among other issues. These issues do arise at the objection stage, but they are incidental or secondary to the primary objective of appointment of administrators.

14. The deceased herein died intestate. Section 66 of the Law of Succession Act provides a guide on who qualifies for appointment in the event of intestacy of the deceased. Priority is given to the surviving spouse, followed by surviving children. The rest of the claimants have a lesser claim to administration. In the instant case, the deceased was apparently not survived by a spouse, but he had children. The petitioner is one of them. The contest over administration is not amongst the surviving children, but between one of his children and a child of one of his brothers, that is as between the petitioner and the applicant. Going by the provisions of section 66 of the Law of Succession Act, it follows that the petitioner has a superior right to administration over the applicant.

15. The estate is said to have a sole asset, Marama/Shiraha/601. There are documents on record showing that the asset is registered in the name of the deceased. An adjoining piece of land known as Marama/Shiraha/603 is registered in the name of the father of the applicant. The two parcels of land apparently came from one piece of land belonging to the grandfather of the petitioner and the applicant. The said grandfather then shared out the land, out of which the petitioner's father got Marama/Shiraha/601, while the applicant's father got Marama/Shiraha/603.

16. The nature of the objectors claim to Marama/Shiraha/601 is elaborated in the applicant's affidavit sworn on 25<sup>th</sup> February 2014. He avers at paragraph 3 as follows:

“That our father was the owner of the adjacent parcel of land registration number Marama/Shiraha/603 and during registration 1.2 acres of our father's land was erroneously registered under the deceased's land Marama/Shiraha/601 where we have lived for over 3 decades.”

17. That then would mean that the applicant and his siblings are not laying a claim to Marama/Shiraha/601 through inheritance, but claiming that there were mistakes done through registration. It is my view, therefore, that if there was a mistake attributable to registration, then the same ought to be rectified through the same process, land registration, and not through the succession process. Such a mistake cannot be rectified through succession.

18. The petitioner does not accept that there was a mistake of that nature and argues that the objectors are simply trying to encroach on the property of the deceased yet they had their own property. That would mean that even if the issue is placed before the probate Judge it would not be solved for the High Court has no jurisdiction, by virtue of Articles 162(2) and 165(5) of the Constitution of Kenya, to handle issues that are the subject of land legislation, and especially the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Registration Act and the Land Act carry provisions, at sections 2, 101 and 150, which state that the court for the purpose of the two statutes is

the Environment and Land Court. It is to that court that the applicant and the objectors ought to go to recover the 1.2 acres in Marama/Shiraha/601 from the estate of the deceased herein.

19. In the circumstances, and to move the matter forward, I shall appoint the petitioner herein administrator of the estate of the deceased. After his appointment he shall refrain from seeking confirmation of his grant to allow the applicant and the objectors move the Environment and Land Court in terms of paragraph 18 above to prove their entitlement to the 1.2 acres in Marama/Shiraha/601.

20. In the end the final orders that I shall make are as follows:

**a. that I hereby appoint the petitioner, Simeon Okiya Ogola, administrator of the estate of the deceased herein, Robert Okiya;**

**b. that a grant of letters of administration intestate shall issue accordingly to the petitioner;**

**c. that thereafter the new administrator shall not apply for confirmation of his grant in the next 366 days from the date of delivery of this ruling;**

**d. that in the next 366 the applicant and the objectors, shall move the Environment and Land Court appropriately to prove their entitlement to the 1.2 acres in Marama/Shiraha/601;**

**e. that the matter shall be mentioned thereafter for further directions on the matter of distribution of the estate; and**

**f. that any party aggrieved by the orders made herein has the liberty to challenge the same at the Court of Appeal within twenty-eight (28) days of date hereof.**

**DATED, SIGNED and DELIVERED at KAKAMEGA this 24<sup>th</sup> DAY OF January , 2020**

**W. MUSYOKA**

**JUDGE**