



REPUBLIC OF KENYA



**In re Estate of Catherine Shiundu Ojinji (Deceased) (Succession Cause 243 of 2012) [2025] KEHC 2460 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2460 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 243 OF 2012  
WM MUSYOKA, J  
FEBRUARY 21, 2025  
IN THE MATTER OF THE ESTATE OF SCO (DECEASED)**

**RULING**

1. I delivered a ruling herein on 10<sup>th</sup> November 2023, where I revoked the grant held then, set aside the orders confirming that grant, appointed new administrators, and directed them to apply for confirmation of their grant.
2. What was more fundamental about the said ruling was the observations made about succession proceedings relating to the estate of the late husband of the deceased, for the dispute that arose after confirmation herein related to how the estate of the late husband of the deceased had been handled. It transpired that some of the assets proposed for distribution in these proceedings were still in the name of the late husband of the deceased, which suggested that transmission of the estate of the late husband of the deceased had not happened.
3. After delivery of that ruling, FOK filed a summons herein, dated 22<sup>nd</sup> April 2024. I shall refer to him hereafter as the applicant. He sought transfer of the cause relating to the estate of the late husband of the deceased herein. His name was EKJO alias EPKO, and administration of his estate was handled through Busia CMCS No. 71 of 1986. The applicant also sought that the file in Busia CMCS No. 71 of 1986 be called up to the High Court, for the purpose of being heard together with the instant cause.
4. The argument advanced was that Busia CMCS No. 71 of 1986 and the instant cause relate to the same assets, Bukhayo/Mundika/1X1, 1X5 and 4XX9. It was explained that PKO had 2 wives, the deceased herein and CAK. In Busia CMCS No. 71 of 1986, the deceased herein was the administratrix. The grant in Busia CMCS No. 71 of 1986 was confirmed, on terms that the estate devolves upon the 2 widows in trust, with directions that the 2 transfer the estate to JS, JK, FK, PW, WK and SA. It is stated that the certificate of confirmation of that grant, issued based on those confirmation orders, omitted to capture the orders on the trust, only disclosing that the estate had been devolved to the 2 widows as joint tenants. Both widows are now dead. It is posited that none of the widows had an estate, for which a succession cause could be mounted.



5. The applicant has attached several documents to his affidavit. There are green cards for Bukhayo/Mundika/1X1, 1X5 and 4XX9. That for Bukhayo/Mundika/1X1 indicates that that property was originally registered to Wechuli Were in 1971, then it was transferred to EK in 1972, and then to the deceased herein and CAK by transmission in 1990. The register was closed in 2004, after it was subdivided into Bukhayo/Mundika/7XX6 and 7XX7. That for Bukhayo/Mundika/1X5 indicates that that property was originally registered to EKO in 1971, before it was transferred to the deceased herein and CAK in 1987 and 1990. In 2012, it was transferred to CAK, through succession. In 2014, it was subdivided into Bukhayo/Mundika/11XX7 to 11XX4, and registered in favour of PWK 4.75 hectares, Vincent Owala Otare 0.40 hectare, Stanslaus Mulwoto 0.10 hectare, Morine Atieno Owino 0.05 hectare, Joyce Arude Angode 0.40 hectare, Agness Nyambura Gathuo 0.05 hectare and Okoth Jaoko 0.05 hectare. The green card for Bukhayo/Mundika/4XX9 indicates that that property was registered in the name of the deceased herein and CAK in 1990. In 2014, it was shared equally between PWK and CAO, with PWK holding it in trust for himself, KO and OO.
6. There is also a copy of typed proceedings, in Busia CMCS No. 71 of 1986, of 30<sup>th</sup> May 1990, when the grant was confirmed. The same comprises the order that the land be registered in the name of the deceased herein and CAK, who were directed to set aside the parcel bought by SRA and transfer the same to him, after which the remainder was to be held in trust for JS, JK, FK, PW and WK in equal shares. A certificate of confirmation of grant was subsequently issued, dated 30<sup>th</sup> May 1990, which indicated that Bukhayo/Mundika/1X1, 1X5 and 9X8 be registered in the names of the 2 widows of the late EKJO.
7. One other significant document is a summons for revocation of the grant made in Busia CMCS No. 71 of 1986, dated 2<sup>nd</sup> May 2024. Revocation is sought on the basis that the surviving spouse and remaining administratrix, CAO, had died in 2023, before completing administration. It is averred that the grant made to her had become useless and inoperative. The application is by FOK, one of the surviving children of the deceased person in that cause. It is mentioned that the certificate of confirmation of grant issued in that cause did not disclose the aspect of the confirmation orders that the 2 widows were to hold the property in trust for the children of the deceased in equal shares. It is also mentioned that an attempt was being made to distribute the assets of the estate in Busia CMCS No. 71 of 1986 in Busia HCSC No. 243 of 2012. He has attached, to his affidavit, the certificates of official search that I have discussed above.
8. A reply was filed on 28<sup>th</sup> May 2024, by way of an affidavit, sworn on 17<sup>th</sup> May 2024, by KO. I shall refer to him hereafter as the respondent. He is the second administrator in this cause. He asserts that there are separate estates for the 2 widows of the late EK, and that the applicant was intruding into a succession cause to which he was not a party. It is further argued that the cause herein and that in Busia CMCS No. 71 of 1986 are distinct, for they relate to estates of different individuals. It is urged that the applicant was not a son of the deceased, hence he had no locus in the instant cause, and he should be initiating succession to the estate of his mother, CAK.
9. The applicant swore a further affidavit on 24<sup>th</sup> June 2024, in response to a replying affidavit sworn on 17<sup>th</sup> May 2024, by his co-administrator, KO. He asserts that there are separate estates for the 2 widows of the late EK, and that the applicant was intruding into a succession cause to which he was not a party. It is further argued that the cause herein and that in Busia CMCS No. 71 of 1986 are distinct, for they relate to estates of different individuals. It is urged that the applicant was not a son of the deceased, hence he had no locus in the instant cause, and he should be initiating succession to the estate of his mother, CAK. It is further argued that the 2 windows of the deceased, in Busia CMCS No. 71 of 1986, had become the joint proprietors of Bukhayo/Mundika/1X1, 1X5 and 9X8, following confirmation of the grant in that cause. It is argued that following the death of the deceased herein,



CSO, all the property forming her estate passed to CAK, through the principle of survivorship. It is argued that by the time the deceased herein died the said deceased had no estate, as the property had devolved wholly to her surviving co-widow, CAK, who had survived her. It is further argued that the trust created by the orders of 30<sup>th</sup> May 1990, in Busia CMCSC No. 71 of 1986, remained in force, as the said orders were never set aside.

10. Directions were given, on 28<sup>th</sup> May 2024, for canvassing of the application by written submissions.
11. The applicant, in his written submissions, dated 24<sup>th</sup> June 2024, argues that there is inherent power, under section 47 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 73 of the Probate and Administration Rules, for the court to grant the orders sought. *Floris Piezzo & Another vs. Giancarlo Falasconi* [2014] eKLR is cited.
12. On his part, the respondent argues that this cause and Busia CMCSC No. 71 of 1986 relate to estates of different individuals, being a husband and one of his wives, while a succession cause to the estate of the other wife was yet to be filed. It is argued that the children from one of the houses of the late Edward Kwoba John were disturbing the children of the other late wife of that man. Finally, it is averred that an appeal was proffered, against the orders made in the ruling of 10<sup>th</sup> November 2023.
13. I made an order, on 22<sup>nd</sup> October 2024, that the file in Busia CMCSC No. 71 of 1986 be availed, for my perusal, before I determine the application, dated 22<sup>nd</sup> April 2024. That file has been availed, and I have perused it. The cause was in respect of EKJO, who had died on 12<sup>th</sup> May 1978. Representation to his estate was sought by CAK, in her capacity as widow of the deceased. She identified the surviving children of the deceased as JS, CKK, JK, FK, WK, JK, JK, MK and EK. POA was listed as a beneficiary. The estate was said to be comprised of Bukhayo/Mundika/1X1, 1X5 and 9X8. Representation was granted to the said CAK, and the same was confirmed in the terms that I have recited above, and a certificate of confirmation was issued along the lines discussed above.
14. I had indicated, in my ruling of 10<sup>th</sup> November 2023, that the proceedings in this cause were messy. See paragraphs 14 and 32 of that ruling. My conclusion is fortified by what I have read in the file in Busia CMCSC No. 71 of 1986. The assets, the subject of the instant cause, were the subject of confirmation orders in Busia CMCSC No. 71 of 1986, where they were devolved to the deceased person herein and the other widow of the deceased. The devolution was not absolute, for the 2 widows were directed by the court, to excise a portion of the land that was due to a purchaser, and to distribute whatever remained after that to 5 named children of the deceased, equally. The 5 children named were JS, JK, FK, PW and WK.
15. However, when the certificate of confirmation was extracted from those orders, of 30<sup>th</sup> May 1990, whether by error or design, the same did not fully capture the purport and essence of the order made that day by the court. The certificate merely captured the first part of the order, and left out the second part. The first part provided for devolution of the estate to the 2 widows. That is what the certificate captured. The second part had 2 parts, one devolution of a portion to SA, and the other devolution of the surplus to the 5 named children, equally. This second portion of the order is what was omitted.
16. The mess, in not capturing fully the confirmation orders of 30<sup>th</sup> May 1990, meant the transmission of the estate, based on the incomplete certificate of confirmation, was transported or transposed to the estate of the deceased herein, Catherine Shiundu Kwoba. If the certificate of confirmation of grant were drafted properly, and transmission of the estate was done completely in accordance with the orders of 30<sup>th</sup> May 1990, there would be not tussle between the children of both sides.
17. My understanding of the orders of 30<sup>th</sup> May 1990, is that the 2 widows were not to take the land absolutely, but in trust, for the buyer and the 5 children, and their sole duty, under those orders, was to



transmit the property to the buyer and to the 5 children. The 2 widows were not to get absolute title to any of the pieces of land, as eventually happened, and, therefore, none of them should have had an estate by the time of their death, for by then they should have had distributed the estate to the buyer and the 5 children as per the orders of 30<sup>th</sup> May 1990. So, the deceased herein, CSO, had no estate which could be distributed in this cause, neither does CAK have any estate which can be distributed in a cause initiated in her name. If the 2 had distributed the property as directed in the order of 30<sup>th</sup> May 1990, to the buyer and the 5 children, nothing would have remained for them, which could pass to their estates upon their deaths, for they were but mere trustees. According to the confirmation orders of 30<sup>th</sup> May 1990, the property should pass directly to the 5 children in Busia CMCSC No. 71 of 1986, and there should be no need for any other succession cause, neither the instant one, nor one in the name of CAK.

18. Upon the demise of the 2 widows, before they had transferred the property in accordance with the orders of 30<sup>th</sup> May 1990, to the buyer and the 5 sons, the trust terminated, and the assets became available for transmission directly from the estate of the deceased to the 5 sons and the buyer in accordance with the orders of 30<sup>th</sup> May 1990, based on the certificate of confirmation of grant. All that the land registrar would have required, to transmit the estate in Busia CMCSC No. 71 of 1986, to the 5 sons and the buyer, after the 2 widows died before doing the needful, would be the certificate of confirmation of grant, dated 30<sup>th</sup> May 1990 and evidence that the 2 widows had died, which would be adequate proof that the trust had terminated.
19. Should I put these 2 causes together? The instant cause and that in Busia CMCSC No. 71 of 1986? No. The 2 causes relate to estates of different persons. Only 1 estate should be subject to administration in 1 succession cause, and no 2 or more estates ought to be administered in 1 succession cause. See *Newton Gikaru Gathiomi & another vs. Attorney General/Public Trustee* [2015] eKLR (Odunga, J), *In re Estate of David Chege Jasan (Deceased)* [2019] eKLR (Muchelule, J), *Jeremiah Mukangu Gioche vs. Samuel Kanyoro Ikua & 3 others* [2020] eKLR (Kimondo, J) and *In re Estate of Sandra Gathoni Kanyotu (Deceased)* [2022] eKLR (Onyiego, J). Secondly, the administration in Busia CMCSC No. 71 of 1986 must be completed before any administration can be contemplated of the estate of any of his 2 widows. Thirdly, Busia CMCSC No. 71 of 1986 is the principal file, and, for that reason, the proceedings in it should be prioritized. A merger of these causes is highly unadvised. Busia HCSC No. 243 of 2012 was the first in time. It was initiated and confirmed at the Chief Magistrate's Court. It should remain there until completion. If anything, it should be the instant cause, Busia HCSC No. 243 of 2012, that should be transferred to the court below.
20. So, what should I do? The file in Busia CMCSC No. 71 of 1986 should be returned to the Chief Magistrate's Court, to facilitate completion of transmission of the estate to the buyer and the 5 sons of the deceased, as per the order of 30<sup>th</sup> May 1990. The file herein shall be held in abeyance, to await completion of the proceedings in Busia CMCSC No. 71 of 1986. Should the proceedings in Busia CMCSC No. 71 of 1986 be completed fully in compliance with the orders of 30<sup>th</sup> May 1990, made in that cause, there would be no need to continue the instant proceedings, and this file, ideally, ought to be closed. But let that bridge be crossed at the right time. In the meantime, the instant file shall lie dormant, until the proceedings in Busia CMCSC No. 71 of 1986 are completed and the court file relating to them be closed.
21. For avoidance of doubt, the orders made on 30<sup>th</sup> May 1990, in Busia CMCSC No. 71 of 1986, by Hon. SO Kanyangi, Senior Resident Magistrate, state as follows:

“The land shall be registered in the name of CAK and ASK.

They will dispose of the land parcels as follows



1. Set aside the parcel bought by SRA and transfer the same to him.
2. Hold the remainder on behalf of
  - a. JS - 32 yrs.
  - b. JK - 19 yrs.
  - c. FK - 14 yrs.
  - d. PW - 27 yrs
  - e. WK - 15 yrs”  
in equal shares.”
22. I have noted that some of the assets changed hands, and some were subdivided and transferred to third parties. In succession proceedings, no child of the deceased should lose out on their entitlement, because the administrator or one of their greedy siblings has acted against the law or court orders, to his advantage and to the disadvantage of the other children of the deceased. At no time should a third party be allowed to benefit over a child of the deceased, or to assert that they have somewhat acquired a right superior to the inheritance rights of a child of the deceased. The fate of these transactions, which favoured third parties, to the disadvantage or detriment of some of the children, shall be determined by the magistrate who shall find himself or herself seized of the matter.
23. There were submissions about the property the subject of the orders of 30<sup>th</sup> May 1990, in Busia CMCS No. 71 of 1986, being held in joint tenancy by the widows, so that, upon the death of one of the widows, the principle of survivorship applied, to devolve the entire property to the surviving widow. The implementation of the orders of 30<sup>th</sup> May 1990 could not result in a joint tenancy, and, therefore, the question of the principle of survivorship applying did not arise. Those orders could only lead to the 2 widows holding a trust over the property, for the benefit of the ultimate beneficiaries, namely the buyer and the 5 sons named in the order, they could not lead to an absolute proprietorship by the widows. The principle of survivorship could only apply to an absolute proprietorship, not to a trust. The rights in an absolute proprietorship are transmittable through succession, for they survive the person enjoying them. A trust confers no rights over trust property on a trustee, equivalent to those that accrue to an absolute proprietor, and, upon the death of the trustee, no rights accrue from the trust in favour of the survivors of the trustee, capable of being transmitted in succession proceedings, for only the beneficiaries named in the trust can benefit.
24. The application, dated 22<sup>nd</sup> April 2024, is hereby declined, for the reasons given above. The file, in Busia CMCS No. 71 of 1986, shall be returned to the Chief Magistrate’s Court registry, for determination of the pending business, along the lines that I have discussed above. I would have loved to transfer the instant succession cause, being Busia HCSC No. 243 of 2012, to the Chief Magistrate’s Court, however, because of the directions that I gave herein on 10<sup>th</sup> November 2023, let this cause remain at the High Court, for the time being. Each party shall bear its own costs. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS AT BUSIA ON THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.



Advocates

Mr. Maloba, instructed by Hammerton Maloba & Company, Advocates for the applicant.

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the respondent.

