Musumba v Wandera (Civil Appeal E004 of 2023)
[2025] KEHC 4564 (KLR) (9 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4564 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E004 OF 2023

WM MUSYOKA, J

APRIL 9, 2025

BETWEEN

JOSEPH MUSUMBA ..... APPELLANT

AND

BERTHA NAITY WANDERA ..... RESPONDENT

(an appeal arising from orders made in the ruling of Hon. T. Madowo, Senior Resident Magistrate, SRM, in Busia CMCSC No. 206 of 2017, of 7th November 2023)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CMCSC No. 206 of 2017, of 7th November 2022. The grounds of appeal revolve around the trial court erring in distributing the estate of the late Eneriko Barasa Musumba in the way it did; giving South Teso/Apokor/1612 to Fobina Akumu and Getrude Amukoya without assigning reasons; failing to consider the evidence of the appellant and his witness on the share due to the appellant; giving shares in the estate to strangers; and dismissing the claim by the appellant without considering the ruling of the Environment and Land Court in ELC No. 61 of 2019 and other documents filed in support.

2. The cause, in Busia CMCSC No. 206 of 2017, was in the estate of Eneriko Barasa Musumba, who had died sometime in 1992. The cause was at the instance of Bertha Nait Wandera, the respondent herein, who styled herself as a daughter-in-law of the deceased. She listed 5 individuals as the survivors of the deceased, being 2 widows and 3 sons, Namukoya Eneriko, Fobina Akumu Etyang, Robert Ochieng and Gilbert Odhiambo Barasa. 6 were listed as dependants, being a daughter-in-law, 2 grandsons, a stepmother and 2 cousins of the deceased, namely herself, Danstan Wabwire Wandera, Eliud Musumba, Arnota Asokoni Musumba, Patrick Musumba and Joseph Musumba, the appellant herein. 5 were listed as beneficiaries, Chrispinus Imwana Obarasa, Oremina Otebat, Moses Munyekenye Othieno, David Wesonga Okiring and Henry Etyang Okemo. The deceased was said to have died possessed of South Teso/Apokor/1611.

3. Letters of administration intestate were duly made on 12th January 2018, to the respondent, and a grant was subsequently issued.

4. The documents, in the original trial court record and the record of appeal, are in disarray, but an objection of some sort was mounted, dated 16th July 2018. I have not seen a copy of that alleged objection in the records, but from the ruling on it, delivered on 31st May 2022, I see that it was summons for revocation of grant, which had been initiated by the appellant herein. The said application was dismissed, but the appellant was appointed administrator, to work together with the respondent.

5. The respondent sought confirmation of their grant, vide an application, dated 15th September 2022. The survivors of the deceased were identified as 5 individuals, being a mother of the deceased, 2 widows and 2 brothers. 7 individuals were listed as buyers of land from the estate, namely Chrispinus Barasa, Albert Emolem Itimokit, David Wesonga, Moses Ekabit Etyang, Antoney Machanga, Moses Munyekenye Otieno and Caiaphas Emayi Okedi. It was proposed that the said property be distributed amongst the 9 individuals listed as survivors and buyers, plus Berita Wandera and Richard Opote Omodig, whose relationship with the deceased and the estate was not disclosed. The property up for distribution was identified as South Teso/Apokor/1611 and 1612.

6. The appellant raised a protest to that confirmation application, through an affidavit sworn on 21st November 2022. He averred that the deceased died a polygamist, with 2 wives, and the estate ought to be distributed between the 2 houses, equally, with the share for the 1st house going to the respondent, and that for the second house to the appellant and his mother. He explained that their father was survived by 2 sons, the deceased in that cause, from the 1st house, and himself, from the 2nd house. He explained further that he was a minor when his father died. He further explained that the deceased became the administrator of their father's estate, and the property of their father was devolved to him, ostensibly holding part of it in trust for him.

7. The confirmation application, with the protest to it, was canvassed by way of written submissions. The ruling on it was delivered on 7th November 2023. The trial court approved the distribution proposed by the respondent, but excluded the buyers from the distribution. It was held that the appellant was not entitled to a share in the estate, as he was not an immediate survivor of the deceased, and if he felt that there was a trust in his favour, in the assets of the estate, then he ought to have moved the appropriate court in appropriate proceedings.

8. The appellant was aggrieved, and brought the instant appeal, founded on the grounds that I have set out in paragraph *1* of this judgement.

9. Directions were taken, on 21st March 2025, for canvassing of the appeal by way of written submissions. I have seen, from the record, written submissions by the appellant, but not by the respondent. I have read the written submissions by the appellant and noted the arguments advanced.

10. The only issue for determination was whether the trial properly determined the confirmation application and the protest that was before it.

11. The starting point should be that the confirmation application was contested, for there was a protest to it. It became contentious, and where litigation, in probate and administration proceedings take that turn, the matter ought to be handled viva voce. It is the best way of bringing out all the issues in contention, so that the court can fully and finally determine them. It is not the sort of thing for handling through affidavits and written submissions alone. The current practice of doing written submissions, for highly contested matters, such as this, where, prior to confirmation, there was a revocation application that went to full hearing, often yields no good results, for it never fully disposes

of the matter, as in this case, where the matter is now on appeal. Written submissions, alone, as a mode of disposing of highly contested disputes, should be avoided.

12. 2 things emerged from the proceedings, which should have guided the court on how to proceed with the matter.

13. Firstly, that the estate comprised of property that was inherited from the estate of the father of the deceased and the appellant herein. South Teso/Apokor/1611 and 1612 were subdivisions from South Teso/Apokor/257, according to the greencard placed on record by the appellant. South Teso/Apokor/257 initially belonged to their father, Musumba Oyiela, for it was registered in his name on 1st August 1972. According to that greencard, the said Musumba Oyiela died, and succession proceedings in his estate were conducted through RMCSC No. 9 of 1991, where the deceased herein was the administrator of the estate. An entry of that fact was made in the register on 8th February 1991. The grant was confirmed sometime in 1993, for the record reflects that a form RL7 was registered on 26th January 1993, leading to the subdivision of South Teso/Apokor/257 into South Teso/Apokor/1611 and 1612, ostensibly registered in the name of the deceased.

14. As clearly emerges from that background, the deceased was not the sole survivor of their father with the appellant. Their father was a polygamist. However, the deceased, as administrator, was treated as the sole heir of their father, hence the estate of their father wholly devolved upon him, to the exclusion of the appellant. That was not necessarily a bad thing, for the deceased could still transfer, before his own death, the share that was due to the appellant, for he clearly held a portion of South Teso/Apokor/1611 and 1612 in trust for the appellant. The deceased did not make an inter vivos transfer of the share due to the appellant, and, upon his death, that share should have been allocated to the appellant in succession proceedings relating to his death. The trial court should have been alive to that.

15. In the ruling, the trial court held that that issue could not be handled in a matter in the estate of the deceased. That could be true. It was clear that South Teso/Apokor/1611 and 1612 were formerly assets in the estate of the father of the deceased and the appellant, and the deceased was the administrator of that estate, in RMCSC No. 9 of 1991. The trial court should have been interested in what transpired in that RMCSC No. 9 of 1991, and directed the appellant to apply to have those records subpoenaed for perusal and guidance. The distribution of South Teso/Apokor/1611 and 1612, in Busia CMCSC No. 206 of 2017, was tied up with what had happened in RMCSC No. 9 of 1991.

16. The trial court should have had sight of those proceedings before distributing the estate, to guide the parties appropriately. So that if South Teso/Apokor/257 was devolved absolutely to the deceased, then it would have become his property. Of course, that would be an injustice to the appellant, which the trial court could not have resolved, except to point out to the appellant that his remedy lay with either moving for revocation of the grant in RMCSC No. 9 of 1991, to right that wrong or injustice, or moving to the Environment and Land Court for a declaration of customary law trust in South Teso/Apokor/1611 and 1612 in his favour.

17. I must, of necessity, much as I say that the court should have taken steps regarding RMCSC No. 9 of 1991, point out that the failure was on the part of the appellant. It was he who was relying on the greencard in question, which disclosed that very critical piece of information or evidence. The greencard was not enough. The real evidence lay in the file in RMCSC No. 9 of 1991. He should have tried to locate that file, and place it before the trial court, for it should not be the business of the court to find evidence for the parties, although some leeway is permitted in probate proceedings, given that the proceedings are meant, largely, to be non-adversarial.

18. The trial court properly found that the appellant was raising an issue of trust, for that is what quite clearly emerged from the details in the greencard. It also properly found that it had no jurisdiction, in probate proceedings, to declare a trust. However, it erred in ploughing on to distribute the estate, when an issue had been raised or arose on a condition or qualification attaching to the estate, which could not be conveniently determined in those proceedings, for, by proceeding to dispose of the property, through distribution, before the issue was resolved, was to disadvantage the appellant, as the property could, thereafter, be alienated to third parties, upon being devolved to the respondent.

19. The procedure, that the trial court should have adopted, is outlined in Rule 41(3) of the Probate and Administration Rules. Where such an issue arises, the court, seized of the confirmation application, should postpone it, by way of setting aside the estate or property in question, to allow time to the person raising the issue to file appropriate separate proceedings, to establish that which he alleges. The issue ought not be ignored, but an opportunity should be given to the person raising it, to pursue it to its logical conclusion, for it would, in one form or other, if not resolved, rear its head, or re-emerge, and delay completion of administration, or plague and rock family relations forever thereafter, sometimes most tragically, should the estate be distributed without getting closure to it.

20. This then meant that the moment the trial court discerned or perceived that the appellant was claiming that there was a trust in his favour, in the ownership of South Teso/Apokor/1611 and 1612 by the deceased or the estate, it should have gone slow on the distribution of the estate, and invoked Rule 41(3) of the Probate and Administration Rules, appropriated the 2 assets and set them aside from the distribution schedule, and given time to the appellant to file separate proceedings, whether by way of a full suit or proceedings under Order 37 rule 1 of the Civil Procedure Rules, at the Environment and Land Court or the enabled subordinate court, to establish that trust. The setting or removal of the property from the distribution schedule is meant for preservation of the property pending those proceedings. Once the Environment and Land Court or the enabled subordinate court resolved the trust issue, the trial court would then reinstate the said assets to the distribution schedule, and proceed to distribute them, of course, depending on the outcome of those separate proceedings.

21. For avoidance of doubt, this is what Rule 41(3) of the Probate and Administration Rules says:

> 41. Hearing of application for confirmation
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> (1) ...
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> (2) ...
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> (3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to *section 71(2)* of the Act, proceed to confirm the grant.
>
> (4) ..."

22. The second issue, related to the first, was that the father of the deceased and the appellant was a polygamist, and the 2 came from different houses. There was need to establish, from RMCSC No. 9 of 1991, whether the distribution of South Teso/Apokor/257, which became South Teso/Apokor/1611 and 1612, was done in a way that kept faith with section 40 of the *Law of Succession Act*, Cap 160, Laws of Kenya, on the distribution of the estate of a polygamist, and establish whether the shares due to the 2 houses of the dead father of the deceased and the appellant were determined, and devolved to the 2 houses. As I said earlier, the distribution in Busia CMCSC No. 206 of 2017 should have depended on and been guided by what transpired in RMCSC No. 9 of 1991, if justice for the appellant was to be met. That was an issue that ought to have been resolved before distribution was embarked upon, and, if the trial court felt it did not have jurisdiction, Rule 41(3) of the Probate and Administration Rules ought to have been invoked, to allow the appellant to move another court appropriately.

23. For the sake of clarity, section 40 of the *Law of Succession Act* provides as follows:

> 40. Where intestate was polygamous
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> (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.
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> (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*."

24. I believe what I have discussed above effectively disposes of the first ground of appeal in the memorandum of appeal, and, indeed, the entire appeal, for the trial court should not have confirmed the grant and distributed the estate, instead it should have invoked Rule 41(3) of the Probate and Administration Rules, appropriated and set aside the assets of the estate, and directed the appellant to file a separate suit to have the issue of trust determined there. The confirmation application should have been held in abeyance, to await the outcome of the trust suit.

25. In view of the above, all the other issues are moot, for they turn on distribution, which the trial court should not have dealt with, before it was determined whether there was a trust in favour of the appellant.

26. The only other ground that I should address is the fifth, about the trial court not considering the ruling in ELC No. 61 of 2019, between the same parties. I have not seen a copy of the ruling in ELC No. 61 of 2019, in the record of appeal that the appellant filed herein. Neither have I seen a copy of it in the original trial court record. All I see, in the record of appeal, are pleadings in ELC No. 61 of 2019, which were not even placed before the trial court. One would wonder how the trial court would have considered a ruling in ELC No. 61 of 2019 when that ruling was not even before that court.

27. I believe that I have said enough, to demonstrate that this appeal should succeed. The order that commends itself to me, to make, is that the orders made in the ruling that was delivered on 7th November 2023, allowing the application dated 15th September 2022, in Busia CMCSC No. 206 of 2017, are hereby vacated or set aside, and substituted with orders that South Teso/Apokor/1611 and 1612 are appropriated and set aside, to await determination of a separate suit that the appellant shall file, to settle the question of the trust that he alleges, or initiation of proceedings in RMCSC No. 9

of 1991, or whichever other steps he may be minded to take, and the confirmation application shall be held in abeyance to facilitate that process. The matter in Busia CMCSC No. 206 of 2017 shall be mentioned by the trial court after 6 months or so, to monitor progress.

28. This appeal is disposed of in the terms set out above. Each party shall bear its own costs. The original trial court records shall be returned to the registry of the trial court. The appeal file shall be closed. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 9TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Joseph V. Juma, instructed by JV Juma & Company, Advocates for the appellant.

Mr. Joseph P. Makokha, instructed by JP Makokha & Company, Advocates for the respondent.