



REPUBLIC OF KENYA



**In re Estate of Wilfrida Makokha Siko (Deceased) (Succession Cause
47 of 2015) [2024] KEHC 1937 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 1937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION CAUSE 47 OF 2015**

WM MUSYOKA, J

MARCH 1, 2024

IN THE MATTER OF THE ESTATE OF WILFRIDA MAKOKHA SIKO (DECEASED)

RULING

1. The certificate of death on record, serial number XXXXXXXX, dated 2nd February 2015, indicates that the deceased herein, Wilfrida Makokha Siko, died on 12th July 1993. I see a letter on record, dated 23rd August 2014, by the Chief of Lwanya Location. It identifies the individuals that the Chief considered to have survived the deceased. It is indicated that the deceased herein was a widow of Siko Okonyo, who died in 1953. Land adjudication had not been done by then, and when it was eventually done, his property was adjudicated and registered in the name of his widow, the deceased herein. Joseph Omondi Muheya is said to be a nephew-in-law of the deceased, being a son of Muheya Okonyo, a brother of her late husband, who had inherited her, upon the demise of her husband. It is stated that the said Muheya was entitled to registration of that property in his name, but he was away during the land adjudication exercise. The Chief did not identify the land in question in his letter.
2. Representation to the estate was sought by Joseph Omondi Muheya, in his capacity as a son of the deceased. He listed the survivors of the deceased as himself and Fredrick Okoch Osiko. Bukhayo/Matayos/1538 is listed as the property that the deceased died possessed of. Letters of administration intestate were made to Joseph Omondi Muheya, on 29th April 2015, and a grant was duly issued, on even date.
3. A summons for revocation of grant, dated 22nd October 2015, was filed herein on 2nd November 2015, by Fredrick Osiko. He sought revocation of the grant, and his appointment as co-administrator with Joseph Omondi Muheya. The grounds on the face of the application were that the proceedings to obtain the grant were defective, there was fraud and misrepresentation, and important matter was concealed from the court. In the affidavit, that the applicant swore in support, it was disclosed that the deceased was his biological mother, and that Joseph Omondi Muheya was not her son, but a son of Susan Akinyi. He asserted that he was the one entitled to inherit the property. He asserted further that the interest of Joseph Omondi Muheya in the property was remote, and that his conduct, with respect to the estate, amounted to intermeddling with it. He stated that his consent was not obtained before the grant was sought, and that it was not disclosed that there had been previous litigation over the land.



4. That application attracted a reply from Joseph Omondi Muheya, sworn on 4th April 2016. He described the applicant as a stepbrother, saying that there were 4 brothers, who he named as Fredrick Okoch, Noah Ojiambo, Joseph Omondi and Michael Oduori. He stated that his mother and the deceased were sisters, married to his father. He asserted that the grant was not obtained fraudulently.
5. The revocation application was canvassed by way of written submissions, following directions that Kiarie J had given on 26th February 2018. Kiarie J delivered a ruling on that application, on 19th April 2018, allowing the same. The grant made to Joseph Omondi Muheya was revoked, and Fredrick Osiko was appointed the new administrator. The findings and holdings by Kiarie J were that Joseph Omondi Muheya was not the biological son of the deceased, that the letter from the Chief had identified the father of Joseph Omondi Muheya and that of Fredrick Osiko as brothers, and the deceased had been inherited by the father of Joseph Omondi Muheya, and that Joseph Omondi Muheya did not rank higher to Fredrick Osiko in succeeding the estate of the deceased. A grant of letters of administration was duly issued, dated 7th May 2018, to Fredrick Osiko.
6. The new administrator then filed a summons, dated 31st August 2018, for orders to have the County Surveyor do works on the estate land, for the purposes of subdivision, ahead of filing a summons for confirmation of grant. He identified the individuals for whose benefit the subdivision was to be done as himself, Enoch Echesa Okotsi, Victor Ogolla Okotsi, Emmanuel Juma Okotsi, Rodgers Omondi Okotsi and Susan Akinyi Muheya. That application was mentioned several times, but was never heard, and it appears that it was abandoned.
7. Various applications were filed by the parties, and eventually Karanjah J, on 28th May 2022, delivered a ruling, where the grant of 19th April 2018 was revoked, and the Public Trustee was appointed administrator.
8. What I am called upon to determine is an application for confirmation of grant, brought by the Public Trustee, dated 17th May 2023. The survivors of the deceased are identified, in that application, as Fredrick Okoch Osiko, Jane Aloo, Consolata Atieno, Jane Anyango, Beatrice Nageri and Catherine Juma, being son and daughters of the deceased, respectively. The property available for distribution is identified as Bukhayo/Matayos/1538. It is proposed to be devolved upon 6 individuals, out of which only Fredrick Okoch Osiko is to get a share out of the 6 children of the deceased. The property is shared out between Fredrick Okoch Osiko, who is identified as son of the deceased, taking 2.46 hectares, while the remainder, 0.12 hectares, is shared out between Susan Akinyi, identified as a stepsister of the deceased, and 4 alleged stepchildren of the deceased, said to be Joseph Omondi Mukheya, Michael Oduory, Noah Ojiambo and Carolyne Agata. There is a consent form in support of the proposed confirmation, dated 14th May 2023, filed herein on 18th May 2023, purportedly signed by Fredrick Okoch Siko. There are also renunciation forms, dated 20th February 2023 and 13th April 2023, purportedly signed by Jane Anyango Mangor, Catherine Juma Mukeya, Jane Aloo, Consolata Atieno and Beatrice Nageri. Another consent on distribution was lodged herein on 2nd November 2023, purportedly signed by Jane Anyango Mangor, Catherina Juma Mukeya, Jane Aloo, Consolata Atieno, Victor Ogolla Okoth and Rodgers Omondi Okoth.
9. Joseph Omondi Mukheya has filed an affidavit of protest, sworn on 9th November 2023, and I shall refer to him hereafter as the protestor. He does not agree with the proposals made in the confirmation application. He states that the estate property is ancestral land, to which he and his siblings are entitled to equal share, with the family of the deceased, on the basis that his father was entitled to ½ share of it. He asserts that he was born and brought up on the said land, and had been in occupation of the land for over 12 years.



10. The application was canvassed by way of *viva voce* evidence, based on directions that were given on 15th November 2023.
11. The oral hearings commenced on 15th November 2023. The protestor, Joseph Omondi Mukheya, was the first to go. He identified Fredrick Okoch Osiko as a cousin, being the son of a brother of his father, in short, as son of his paternal uncle. He testified that his grandfather was called Okonyo, and the deceased was the wife of his uncle, Osiko. He stated that the subject land was not under land registration during the lifetime of Okonyo and his sons. He stated that at land adjudication and registration, the property was placed under the name of the deceased, at a time when his father was working in Uganda, and asserted that the property registered included the interest of his father. He said that the whole of the land was 9½ acres, and each of the 2 sons of Okonyo were entitled to ½ each of that property. He stated that its original registration number was Bukhayo/Matayos/930. It was subsequently subdivided, after the deceased sold part of it. He said that the portion remaining in the name of the deceased was Bukhayo/Matayos/1538. He stated that it was the portion that should have gone to his father that was sold. He stated that it was the court that divided the land. He conceded that he had not taken out succession proceedings in the estate of his father. He stated that the deceased was inherited by his father, after her husband died. He added that the deceased also had daughters.
12. Fredrick Okoch Osiko followed. He stated that his grandfather was Okonyo, who had 3 sons, but one died young. He identified those who survived as Mukheya and Osiko. He said that Osiko was his father, while Mukheya was the father of the protestor. He said that he had blood sisters, 5 of them, and he named them. He described the survivors of the deceased as 6 individuals. He stated that the deceased was his mother, and the registered owner of the subject property, Bukhayo/Matayos/1538. He stated that the father of the protestor was Susan Akinyi, who he said was still alive. He asserted that the deceased was registered as proprietor of the land in 1969, and that she was on that land alone then, and there was no man. He asserted that his late father had no land, neither did the father of the protestor. He said that his father and the father of the protestor were not blood brothers, for they had different mothers. He stated that his grandfather lived in Marachi, died there and was buried there. He said that his 2 sons grew to adulthood, and that whereas Mukheya remained in Marachi, Osiko moved to Matayos, where his maternal relatives were, and he was given land by them. Osiko died in 1954, then Mukheya moved in to Matayos, to live with the widow, his mother. He stated that the protestor was born in Uganda, where his father was working in the army, and that they came back to Kenya in 1987. He stated that they lived on the land registered in the name of the deceased, and that was where their mother is. He stated that Mukheya died in 1991. He said that the original land was Bukhayo/Matayos/930, which was subdivided and a portion sold, he said that it was the deceased who sold the land. He said that he was agreeable to the protestor and his family getting a portion, as the deceased had decided to accommodate them.
13. At the end of the oral hearings, the parties filed written submissions, which I have read through, and noted the arguments made.
14. The most central issue in this litigation is the entitlement of the family of the protestor to a share in the estate. The principal claim is that Bukhayo/Matayos/1538 is ancestral land, initially belonging to the grandfather of the protestor and Fredrick Okoch Osiko, who died before land registration was done. When land adjudication and registration was happening, the father of Fredrick Okoch Osiko had died, but the father of the protestor was alive. However, at that time, the father of the protestor was in Uganda, working with the Ugandan army. The person on the ground was the deceased, and the entire parcel was registered in her sole name. The protestor argues that she was not entitled absolutely to the property, but to only ½ share of it, as the other ½ share was meant for the family of the protestor.



It was on that basis that he had sought and obtained representation to the estate. So what he raises is existence of a customary trust in favour of his family.

15. Fredrick Okoch Osiko disagrees. His case, from his oral testimony, is that the land in question is not ancestral, for it did not belong to their grandfather, but originated from the maternal relatives of his late father, who was not of the same mother with the protestor. According to him, that would rule out the alleged customary law trust. He argues that their late grandfather had land at Marachi, and that is where the family of the protestor should be, as the deceased merely accommodated the family of the protestor, after it relocated from Uganda, in 1987.
16. I should not embark on distributing the property herein before the issue, as to whether the subject land is subject to a customary trust, is resolved. For if there is a customary trust, or any other kind of trust, then the family of the protestor would be entitled to a portion of the land. If no such trust exists then the estate should be for distribution to the descendants of the deceased, subject to any portion of the land that they may wish to give to the family of the protestor, as evinced in their filings and oral testimony.
17. Do I, sitting as High Court, have jurisdiction to make a determination on the existence of the alleged customary trust? I do not think so. That is a matter of ownership or title to land. Articles 162(2) and 165(5) of *the Constitution* took away that jurisdiction, and conferred it exclusively on the Environment and Land Court. That latter court, or the empowered subordinate courts, is the court with jurisdiction.
18. Articles 162(2) and 165(5) of *the Constitution* state as follows:

“ 162(2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

 - (a) ...
 - (b) the environment and the use and occupation of, and title to, land.”

“ 165(5) The High Court shall not have jurisdiction in respect of matters—

 - (a) ...
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”
19. So, what should I do? The answer lies in section 71(2)(d) of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rule 41(3) of the *Probate and Administration Rules*. Section 71(2)(d) of the *Law of Succession Act* empowers the court to postpone determination of a summons for confirmation of grant, for one reason or other. Rule 41(3) of the *Probate and Administration Rules* allows the court to set aside or appropriate an asset or a portion of it, whose ownership is in contention, or in respect of which there is a contested interest, to enable the parties move the relevant court, in appropriate proceedings, for determination of the question. The question herein is whether the deceased held Bukhayo/Matayos/930, the precursor of Bukhayo/Matayos/1538, in trust for the family of the protestor. I should postpone these confirmation proceedings, and set aside or appropriate the estate asset, to allow the parties to take the needful steps, to prove the customary law trust. The determination of the summons for confirmation of grant shall be subject to the outcome of the land proceedings.
20. Section 71(2)(d) and Rule 41(3) provide as follows:

“71(2)(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.”



“41(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. 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.”

21. The Public Trustee is the administrator of the subject estate, and the applicant in respect of the application the subject of this ruling. The Public Trustee has never attended court on the dates when the matter came up, whether for mention or hearing, after he was appointed as such. The oral confirmation hearings were conducted in his absence. I sense dereliction of duty. The Public Trustee is an officer of the court, and failure to attend court, when a matter where it is involved comes up, suggests some level of contempt of court. As an administrator, it also suggests some failure to discharge his duties as an administrator, to advance an application, that he has filed in court, for confirmation of his proposed distribution, and his own confirmation to complete administration. It is unfortunate.
22. The final orders are:
 - a. that determination of the summons, dated 17th May 2023, is hereby postponed, and Bukhayo/Matayos/1538 is hereby set aside or appropriated;
 - b. that the parties hereto are hereby directed to move the appropriate court, in appropriate proceedings, to obtain a determination on the question of the alleged customary trust in Bukhayo/Matayos/1538;
 - c. that this court shall determine the confirmation application, dated 17th May 2023, after the finalisation of the proceedings to be initiated under (b), above; and
 - d. that the matter shall be mentioned, after 6 months, for compliance and further orders.

RULING DATED AND SIGNED AT BUSIA AND DELIVERED BY EMAIL ON THIS 1ST DAY OF MARCH 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Kenduiywo, instructed by the Public Trustee, for the applicant.

Mr. Ipapu, instructed by Ipapu P. Jackah & Company, Advocates for the protestor.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for Fredrick Okoch Osiko.

