



REPUBLIC OF KENYA



**In re Estate of Makokha Wamania (Deceased) (Succession Cause  
387 of 2012) [2024] KEHC 11849 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
SUCCESSION CAUSE 387 OF 2012  
WM MUSYOKA, J  
OCTOBER 4, 2024**

**IN THE MATTER OF THE ESTATE OF MAKOKHA WAMANIA (DECEASED)**

**RULING**

1. The application, dated 24<sup>th</sup> February 2023, sought reinstatement of proceedings that had been dismissed on 16<sup>th</sup> December 2021. The proceedings in question were for confirmation of the grant, where evidence had been taken on an application, dated 1<sup>st</sup> April of an unknown year, before the matter stalled, and was eventually dismissed. I reinstated it on 18<sup>th</sup> October 2023, and allocated it dates for hearing.
2. The cause relates to the estate of the late Makokha Wamania, who died on 1<sup>st</sup> August 2010. He was said, in the affidavit in support of the petition, to have been survived by 9 individuals, whose relationship with him was not disclosed. The 9 are Chrispinus Wandera Makokha, Peter Barasa Makokha, Albert Okuku Makokha, Vincent Nyongesa Makokha, Charles Wabwire Makokha, Gabriel Makokha, Titus Odwori Makokha, Fredrick Makokha and Luka Makokha. Zablon Danican Juma is listed as a liability. The deceased had died possessed of Bukhayo/Matayos/11. A grant was made on 14<sup>th</sup> March 2013, and issued on 26<sup>th</sup> March 2013, to Philip Oundo.
3. The summons for confirmation of grant, dated 1<sup>st</sup> April of an unknown year, was brought by Philip Oundo Makokha. His survivors are the 9 individuals listed in the petition, named as Chrispinus Wandera Makokha, Peter Barasa Makokha, Albert Okuku Makokha, Vincent Nyongesa Makokha, Charles Wabwire Makokha, Gabriel Makokha, Titus Odwori Makokha, Fredrick Makokha and Luka Makokha. 2 creditors are listed, being Zablon Danican Juma and Andrew Omandi Chesa. In the distribution proposed, of Bukhayo/Matayos/11, Philip Oundo Makokha is allocated 2 acres, Zablon Danican Juma 1 acre and Andrew Omandi Chesa ½ acre. The balance, of 7 acres, is to be shared equally between Chrispinus Wandera Makokha, Peter Barasa Makokha, Albert Okuku Makokha, Vincent Nyongesa Makokha, Charles Wabwire Makokha, Gabriel Makokha, Titus Odwori Makokha, Fredrick Makokha and Luka Makokha.
4. An affidavit of protest was sworn by Petronila Adhiambo Makokha and Albert Okuku Makokha, on 23<sup>rd</sup> November 2015. Petronila Adhiambo Makokha disclosed that she was a widow of the deceased,



who also had another wife, known as Nastanzia Makokha, who was also deceased, and that Albert Okuku Makokha was his son. They state that the deceased was the registered proprietor of Bukhayo/Matayos/11. They state that the administrator was not a blood relative of the deceased, and, therefore, he was not a beneficiary of the estate. They further state that they were not consulted when the confirmation application was being crafted. They contest the proposals made, and the distribution proposed.

5. The administrator swore an affidavit, on 27<sup>th</sup> February 2017. He avers that the protestors had abandoned the objection they had filed earlier, and that the estate should be distributed as per his proposals.
6. The confirmation application was disposed of orally. Both sides testified.
7. Petronilla Adhiambo Makokha was the first to go. She described the deceased as her husband. She adopted her statement. She averred that the succession process was done in a hurry, and without the family being involved, and for that reason the administrator could not be relied upon to diligently administer the estate. She further averred that the deceased had already shown his sons their respective portions of land before he died. He had directed that the administrator and his brother should move out of the land, and look for their own biological father to give them land.
8. Albert Okuku Makokha followed. He was a son of the deceased. He said that the administrator was a nephew of the deceased, as his father was a cousin of the deceased. He stated that the land of the father of the administrator was elsewhere, at Silivare. He said the administrator was not entitled to a share in the estate. He stated that the deceased was survived by 2 wives and children only.
9. Cornel Egesa testified last. He was a relative of the deceased. He said that he did not know how the deceased was related to the administrator, Philip Oundo. He said that he did not know the circumstances behind how the administrator came to be on the land. He stated that the relatives of the administrator were at Silivare, and that was where their land was.
10. The administrator, Philip Oundo Makokha followed. He described the deceased as his paternal uncle, as his mother was married to a brother of the deceased. He accused the deceased of having grabbed land from his father, by doing adjudication in the absence of his father, and causing himself to be registered as the sole proprietor of the land. The matter went before the Land Disputes Tribunal, and his father was awarded 3½ acres, inclusive of where his grave was located. He said that he sold a portion of the land which was due to his father, asserting that he followed due process in doing so.
11. Charles Juma testified next. He was an in-law in the family of the deceased, as his sister was married to the father of the administrator. He stated that the mother of the administrator had been inherited by the deceased after his own father died. He explained that under Luhya custom, upon widow inheritance, a son, begotten from that relationship, is treated as a child of the widow-inheritor, and he should benefit from the estate of the man who inherits his mother, and who sires him. He stated that the inheritor becomes the owner of the land of the man whose widow he inherits. He asserted that the administrator was entitled to inherit the property. He stated that there was a case at the Tribunal, before the parties came to the succession court. He stated that the administrator had distributed the land, and that the protestors only came in to cause trouble. He stated that the deceased had his own land at Matayos, at a place called Silivale. He stated that the deceased came from Silivale to inherit the grandmother of the administrator. He said he was very small when the grandmother of the administrator died, and he could not tell where she was buried. He conceded that he did not witness the grandmother of the administrator being inherited, but said that his sister was married into that family, and he could see what was happening, while he was staying with his sister. He said that land adjudication was done in 1966, while he was in secondary school, and his sister had told him that the



land had been adjudicated, and given to the deceased. He said that the father of the administrator did not participate in the land adjudication process, as he was in Mombasa, and he could not come for the exercise, on account of the distance. He explained that the father of the administrator and the deceased shared a mother, but had different fathers. When the grandfather of the administrator died, his mother was inherited. He said that, as he was not a member of the family, he did not get to know the registration details of the land. He said that the administrator was the son of Gabriel, and he could only get the land that was due to Gabriel, and which was being held by the deceased. He stated that the administrator was claiming the land due to his father from his grandfather, and not that due to the deceased, the inheritor, from his lineage. He said that the administrator had a brother, who was not entitled to the land, as he had his own. He said that, at the Land Disputes Tribunal, the deceased testified that the land belonged to the father of the administrator. He said that his sister bore 6 children to the father of the administrator. He said that the inheritor did not move out of the land, as the wife he had inherited was still on the land, with her son, the father of the administrator. He said that he did not know where the grandfather of the administrator was buried.

12. At the end of the oral hearings, the parties filed written submissions, which I have read through, and noted the arguments made.
13. At confirmation, the court confirms the administrators and makes orders on distribution. That is what is envisioned in section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya. Before I can consider the distribution proposed, let me address the issue of representation first.
14. The estate herein is of one Makokha Wamania. The property in question is Bukhayo/Matayos/11, registered on 23<sup>rd</sup> June 1971, in the name of the deceased herein. The dispute turns on the real owner of the said property, between the deceased herein and one Gabriel, the father of the administrator. The deceased and Gabriel were said to be sons of the same mother, but by different fathers. The property is alleged to have had belonged to the father of Gabriel, and when he died, the mother of Gabriel was inherited by the father of the deceased, and the deceased was born out of that liaison. The land was registered in the name of the deceased, instead of that of Gabriel, as Gabriel was away in Mombasa at the time. The claim appears to be that that registration meant that the deceased held the property in trust for Gabriel. So, the contest is between the families of Gabriel and that of the deceased. The family of Gabriel alleges that the property belonged to Gabriel, and was registered in the name of the deceased, either fraudulently or in trust. The side of the deceased claim that the property was in the name of the deceased, and it should devolve to his family, and that the family of Gabriel was not entitled to it.
15. It would appear that there was litigation, at the Land Disputes Tribunal, in Busia CMC Land Dispute No. 129 of 2011, where the family of Gabriel was awarded, through Philip Oundo Okoki, 3½ acres, out of Bukhayo/Matayos/11. There is an order in Busia CMC Land Dispute No. 129 of 2011, where the award of the Matayos Land Disputes Tribunal, was adopted, in those terms, on 20<sup>th</sup> January 2012. Both sides have a claim to the property. One side, on the basis that the property was registered in the name of their kin, and the other, on the basis of the court order in Busia CMC Land Dispute No. 129 of 2011.
16. The issue then is whether the administrator herein, Philip Oundo, was properly appointed administrator. He does not belong to the family of the registered proprietor of the land, but he holds the court order in Busia CMC Land Dispute No. 129 of 2011. Between the 2 sides, he had a lesser right to administration, by dint of section 66 of the *Law of Succession Act*, as he was more of a liability or creditor or claimant, than an heir in intestacy. It would appear that he was aware of that, hence he cited the protestors, and others, in Busia Miscellaneous Application No. 22 of 2012, and an order was made, on 23<sup>rd</sup> July 2012, directing the protestors and the others to petition for administration of the estate of the deceased herein within 60 days, in default of which the administrator would have the liberty.



- I have not had the benefit of seeing the file in Busia Miscellaneous Application No. 22 of 2012, and, therefore, I cannot tell whether or not the citations were properly served on the protestors and the others, the citees in that cause, and whether, upon the order of 23<sup>rd</sup> July 2012 being made, the citees were served with the said order, and defaulted, necessitating the initiation of the instant cause by the administrator. I cannot, tell, therefore, whether these succession proceedings were properly initiated, in the circumstances, although I do note that the petition was lodged herein on 5<sup>th</sup> November 2012, way outside the 60 days allowed to the protestors in Busia Miscellaneous Application No. 22 of 2012.
17. On distribution, I note that the administrator obtained a court order, in Busia CMC Land Dispute No. 129 of 2011, favourable to him. There could be issues as to whether the Land Disputes Tribunal had any jurisdiction under the law upon which it exercised jurisdiction, the *Land Disputes Tribunals Act*, Cap 303A, Laws of Kenya now repealed, to make orders on ownership of registered land. I note, however, that the protestors have not raised that issue, and I will not venture to consider it. Ideally, the administrator was not claiming as an heir or inheritor, but on the strength of a court order. He should have sought to enforce it directly through the Land Registrar, Busia County, without having to go through succession, for the court in Busia CMC Land Dispute No. 129 of 2011 had already awarded him a portion of Bukhayo/Matayos/11, and his share could be hived off without being subjected to succession. But no matter.
  18. On appointment of the administrator as such, and without prejudice to what I have stated above, I do note that he had a stake in the estate, by dint of the order in Busia CMC Land Dispute No. 129 of 2011, which qualified him to seek representation as such in the estate of the proprietor of the subject property. I note too that he obtained citations against the protestors and others, in an effort to have them petition for representation. It would appear that they did not heed the order in Busia Miscellaneous Application No. 22 of 2012, hence the administrator was justified to move the court herein, in accordance with the order in Busia Miscellaneous Application No. 22 of 2012. He was properly appointed administrator, as those with prior right did not appear keen on taking representation to the estate.
  19. On distribution, I have the court order in Busia CMC Land Dispute No. 129 of 2011. There is no evidence that the protestors ever challenged it, on either appeal or review. It subsists. I should not conduct a trial on issues that have already been tried by another tribunal, and determined. The administrator is, according to that order, entitled to 3½ acres, out of Bukhayo/Matayos/11. That should be hived off first, before the rest of the estate is shared out between the protestors. The protestors have not made proposals on how the portion due to them is to be shared out, and I shall leave it open to them to move the court appropriately.
  20. I was told that the administrator had sold land to some individuals, and it would appear that there could be credence to that, for he has listed those individuals as creditors. However, I am devolving a portion of Bukhayo/Matayos/11, to the administrator, on the basis of the court order in Busia CMC Land Dispute No. 129 of 2011. That order was made in favour of only 1 person, the administrator herein. It makes no mention of any buyer, and I shall not reckon any in the distribution. Any such buyers shall be at liberty to pursue the administrator, hereafter, to obtain whatever it was that he had purported to have sold to them.
  21. I have not found merit in the protest herein, for the reasons discussed above, and I hereby dismiss it. I shall confirm the administrator as such, but I shall appoint one of the protestors as a co-administrator, to cater for their interests. Bukhayo/Matayos/11 shall be distributed in a manner in which the administrator gets 3½ acres, with the balance going to the protestors, in equal shares, pending agreement on that side of the family on distribution.



22. The final orders are as follows:

- a. that the protest herein, dated 23<sup>rd</sup> November 2015, is hereby dismissed;
- b. that the confirmation application, dated 1<sup>st</sup> April of an unknown year, but filed herein on 17<sup>th</sup> April 2015, is hereby confirmed, in the terms set out here below;
- c. that I confirm Philip Oundo as an administrator, but appoint Petronilla Adhiambo Makokha, as co-administratrix, for the reasons set out in the body of the ruling;
- d. that a grant of letters of administration intestate shall issue accordingly, to the 2 in (c), above;
- e. that Bukhayo/Matayos/11 shall be distributed, so that Philip Oundo Makokha takes 3½ acres, in terms of the order in Busia CMC Land Dispute No. 129 of 2011, with the balance being devolved upon the family of the late Makokha Wamania, to be held in trust by the 2 protestors;
- f. that a certificate of confirmation of grant shall issue accordingly;
- g. that the family of Makokha Wamania may hereafter make proposals on how the share due to it is to be shared out amongst the entitled family members;
- h. that the matter shall be mentioned, after 6 months, on 24<sup>th</sup> April 2025, to confirm whether the administrators, appointed under order (c), above, will have transmitted the estate in terms of order (e) above;
- i. that each side shall bear its own costs; and
- j. that any party, aggrieved by these orders, has leave of 30 days to appeal against the same at the Court of Appeal.

23. Orders accordingly

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 4<sup>TH</sup> DAY OF OCTOBER 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Philip Oundo Makokha, administrator, in person.

Ms. Petronilla Adhiambo Makokha, 1<sup>st</sup> protestor, in person.

Mr. Albert Okuku Makokha, 2<sup>nd</sup> protestor, in person.

