



**In re Hezbon Onyango Nyabola (Deceased) (Probate & Administration
682 of 2011) [2023] KEHC 674 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PROBATE & ADMINISTRATION 682 OF 2011
RE ABURILI, J
FEBRUARY 13, 2023
IN THE MATTER OF THE ESTATE OF HEZBON ONYANGO
NYABOLA-DECEASED**

BETWEEN

EVALYNE AWINO OPIYO PETITIONER

AND

MAURICE JUMA NYABOLA PROTESTOR

RULING

1. The deceased herein Hezbon Onyango Nyabola died intestate on July 11, 2009. According to the affidavit in support of the petition, the deceased was survived by the 1st petitioner Evalyne Awino Opiyo as the widow and the 2nd petitioner is stated to be his brother. The two then jointly petitioned for letters of administration and were issued with a joint grant to administer the estate of the deceased on July 27, 2015. From the Summons for Confirmation of grant dated May 10, 2022 and supported by a joint affidavit sworn by the petitioners on May 12, 2022, it is proposed that land parcel No. Kisumu/Nyalenda 'A'/1606 which is registered in the mname of the deceased Hezbon Onyango Nyabola be held jointly between the petitioners. Subsequently, the parties appeared before the court on 14/11/2022 wherein they could not agree on the mode of distribution and this court therefore directed each party to file their respective affidavits on the proposed mode of distribution of the said estate.
2. Pursuant to that order, the 2nd petitioner filed his affidavit sworn on December 19, 2022 while the 1st petitioner did not comply. The deponent Maurice Nyabola deposes that he bought the disputed parcel of land from Michael Omondi Marenya (deceased) and the parcel was then created out of sub division of a bigger parcel No. Kisumu/Nyalenda 'A'/ 956. That at the time of such purchase, the 2nd petitioner worked in Nairobi and therefore entrusted his brother (the deceased Hezbon Nyabola



- herein) to making the payments on his behalf as regular travelling to and fro Nairobi would be costly on his part.
3. That at the time of such purchase, the deceased herein was staying in Nyalenda with their elder sister so that the deponent's desire to purchase the parcel of land was made in their presence. That the purchase price was paid in bits until he cleared and because of the trust he had in his now deceased brother, the title was registered in his name although the deponent continued paying for the purchase price even after the demise of his brother.
 4. He further deposes that he together with the 1st petitioner sold off the parcel to one Fredrick Oduor Ng'ong'a on December 20, 2011 and that with the involvement of the 1st petitioner as to facilitate the devolution of the estate to the purchaser. He accuses the 1st petitioner of skipping a family reconciliatory meeting and thereafter clandestinely commencing another succession cause in 2020 during the pendency of this matter.
 5. In light of the failure by the 1st petitioner to file any protest or propose a different mode of distribution of the estate of the deceased despite this court calling upon her to do so, the court did not have the benefit of her argument so that only what the 2nd petitioner has filed and on oath is what is available for purposes of disposal of the matter before me.
 6. The title deed to the property was issued on December 30, 2008 in favour of the deceased. There are documents that appear to be sale of land agreements annexed to the protestor's affidavit written in Luo language without an accompanying certificate of translation and as such, the court cannot make out the contents thereof.
 7. The other issue I find worth deliberating on is the fact that the subject parcel of land has been disposed of to a third party even before the grant is confirmed. An agreement akin to a sale agreement entered into between the petitioners on the one hand and one Fredrick Oduor Ng'ong'a on the other hand has been annexed.
 8. Although this issue was not raised by either of the parties, I noted during the day fixed for confirmation of the grant that the said Fredrick was in court awaiting to be given his parcel of land and of course oblivious of the fact that the transaction for sale of an estate of the deceased before confirmation of the grant was illegal and is tantamount to intermeddling with the estate of the deceased. This illegality attracts penal sanctions under section 45 of the Law of Succession Act which provides that:
 1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 2. Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
 9. The protestor's assertion that he bought the parcel of land or that he shared out the proceeds with the 1st petitioner does not guarantee or confer upon him the rights to sell the parcel of land in the absence of confirmed grant of letters of administration.



10. For the above reason, I find that the purported sale of the deceased's parcel of land to a third party before confirmation of a grant in favour of the administrators was an act of intermeddling with the estate of the deceased and was and remains illegal for all intents and purposes and liable to be declared as such. My final disposition on this issue will however await my ultimate disposal of the other issues in this matter and is therefore held in abeyance.
11. Another issue arising from the protestor's affidavit is the fact of the existence of a parallel succession cause before the subordinate court allegedly filed by the 1st petitioner and her daughter Faith Sally Atieno. According to the protestor's affidavit, the cause has been gazette vide Vol.CXXIINO.80 of 2nd October, 2020 vide gazette Notice No. 7736. Not much information on the status obtaining as at now is available.
12. Based on this, and to prevent the ends of justice from being defeated and in exercise of the supervisory powers vested on this Court by article 165(6) of the *Constitution*, I hereby call into this court succession cause KISUMU CMC P & A Cause No. 338 of 2020 for purposes of perusal and giving of directions and or further orders.
13. In the meantime, the following orders and or directions are given.
 - a. The sale agreements annexed to the protestor's application written in Luo language be translated and the accompanying certificates of translation be filed in court within seven (7) days of today for the court to peruse and determine what exactly the documents written in Dholuo are saying upon which it will give appropriate orders on the Summons for Confirmation of grant.
 - b. The Original Court file in Kisumu CM Succession Cause No. 338 of 2020 to be submitted to this Court forthwith for further orders/ directions as the Court may deem fit and just.
 - c. Further proceedings in Kisumu CM Succession Cause No. 338 of 2020 be stayed pending further directions of this court.
 - d. This matter shall be mentioned on April 24, 2023 to confirm availability of the Kisumu CMC Succession Cause No. 338 of 2020 and the filing of translated documents as directed in order No. (a) and (b) above.
 - e. I make no orders as to costs at this stage.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2023

R.E. ABURILI

JUDGE

