



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Jairus Owino Onyango (Deceased) (Succession Cause  
71 of 2013) [2023] KEHC 23480 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23480 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SUCCESSION CAUSE 71 OF 2013  
JRA WANANDA, J  
OCTOBER 13, 2023**

**BETWEEN**

**GODFREY MUSINDE MUSOLIZA ..... 1<sup>ST</sup> APPLICANT  
FELISTAS KHAYELI ALALA ..... 2<sup>ND</sup> APPLICANT  
SINAFWA MBOGA EDAGISA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MARY NAKHERO OWINO ..... PETITIONER**

**AND**

**JOHN ONYANGO OWINO ..... 1<sup>ST</sup> RESPONDENT  
ELISHA OTWOMA ..... 2<sup>ND</sup> RESPONDENT  
OWINO EDWARD ESONGA OWINO ..... 3<sup>RD</sup> RESPONDENT  
KENNEDY CHIMWANI OWINO ..... 4<sup>TH</sup> RESPONDENT  
JOSEPH NAMWIKO OWINO ..... 5<sup>TH</sup> RESPONDENT  
JEREMIAH OKELLO OWINO ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The deceased died on 29/03/2007. The Grant of Letters of Administration Intestate was issued on 3/10/2013 and the same was subsequently confirmed on 13/07/2017. The only property comprised in the estate is Uasin Gishu/Nyenyilel Settlement Scheme/424.
2. Apart from shares distributed to the family members as heirs vide the said Certificate of Confirmation, other portions were distributed to other 6 persons described as purchasers. The 3 Applicants were part of this category of persons.



3. Now, before Court is the Application brought by way of the Summons dated 29/11/2021 and which seeks the following orders:
- i. Spent.
  - ii. That this Honourable Court be pleased to Order the County Surveyor Uasin Gishu to visit the estate parcel of land Uasin Gishu/Nyenyilel Settlement Scheme/424 and demarcate according to the confirmed Grant issued on 26<sup>th</sup> July 2017, Sale Agreements with the deceased and drawn Mutation Form No. 171202 dated 23<sup>rd</sup> April 2004.
  - iii. That upon the County Surveyor visiting the estate property and conducting demarcation and issuing numbers for registration, do file a report within 30 days thereof.
  - iv. That pursuant to the Certificate of Confirmation issued on 26<sup>th</sup> July 2017, an order be made allowing the Deputy Registrar of this Honourable Court to sign and execute all documents necessary to cause the transfer of the Certificate of Confirmation in favour of the Applicants/Creditors to be excised from the estate parcel of land Uasin Gishu/Nyenyilel Settlement Scheme/424 in accordance with the Confirmed Grant issued on 26<sup>th</sup> July 2017, Letter of Consent dated 5<sup>th</sup> December 1996 and Mutation Form 171202.
  - v. That the Uasin Gishu Land Registrar be ordered to give effect to the orders of this Honourable Court proceeding with the registration and transfer of the Applicants shares in their respective names from the estate parcel of land Uasin Gishu/Nyenyilel Settlement Scheme/424 in accordance with the Confirmed Grant on 26<sup>th</sup> July 2017, Letter of Consent dated 5<sup>th</sup> December 1996 and Mutation Form No. 171202 subject to statutory duty.
  - vi. That the Petitioner/Administrator meets the costs of this Application.
4. The Application is filed through Messrs Angu Kitigin & Co. Advocates and is stated to be brought under “section 47 of the [Law of Succession Act](#) (cap 160 Laws of Kenya) Rules 49, 72 and 73 of the [Probate & Administration Rules](#) and all enabling provisions of the law.” The grounds of the Application are as set out on the face thereof and is supported by the Affidavit sworn by the 2<sup>nd</sup> Applicant, Felistas Khayeli Alala.
5. In the Affidavit, the 2<sup>nd</sup> Applicant stated that she swore the Affidavit also on behalf of the other Applicants and deponed that the Applicants are purchasers for value of portions of the deceased’s estate, they entered into a Sale Agreement with the deceased who is the husband of the Administrator and father to the heirs with clear location of the boundary as indicated in the relevant Agreements, through the help of their area chief they secured assistance of the government surveyor who demarcated the land and prepared a mutation form for the deceased to sign to enable registration of the subdivision according to the consent letter issued on 5/12/1996, despite several meetings at their local authority’s office, the family of the deceased has been unwilling to surrender the Applicant’s shares as per the Sale Agreements and the Certificate of Confirmed Grant issued on 26/07/2017 only alluding that their mother is sick and thus taking them long to transfer the shares.
6. She added that as purchasers, they fully financed the process of filing Letters of Administration after the Court granted leave to the 1<sup>st</sup> Applicant to file the Letters of Administration in Eldoret



High Court Misc. Succession Cause No. 172 of 2011, the Court issued a Certificate of confirmed Grant in 2017 in favour of the Petitioner, estate heirs and the Applicants/Creditors herein, there is uncontested and unchallenged evidence that before the deceased passed on, he had sold to the Applicants various portions of the estate property, Uasin Gishu/Ngenyilel Settlement Scheme/424 indicating the boundary and he had been fully paid, the Applicants had been put by the deceased to possession of the respective portions that they had purchased and shown the boundaries, the Applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them, the Administrator/Respondent who is the wife of the deceased was all along aware of these transactions, there is no dispute as to confirmation and location of the parcel of land and that in spite of a Court Order and further Certificate of Confirmation issued on 26/07/2017 allowing the Petitioner to administer the estate and execute/register all the necessary documents required for transfer of the property, the Respondents have not complied.

### **Respondents' Response**

7. The Application is opposed vide the Replying Affidavit sworn by the Petitioner-1<sup>st</sup> Respondent - John Onyango Owino - and filed on 27/06/2022 through Messrs Kiplagat J. Misoi & Co. Advocates. In the Affidavit, the Petitioner deponed that he was swearing the Affidavit also on behalf of all the other Respondents. He stated that the Respondents have not denied the Applicants titles to their respective shares and that their mother signed the relevant documents of transfer in favour of the Applicants , it is the Applicants who stopped the process of transfer by placing a caution on the entire piece of land at the Lands Registry, the Caution has stopped the entire process of issuance of titles, the Applicants' portion is well demarcated and each is residing on his respective share without any interference from the Respondents, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have sold their shares to third parties who were not in the list of beneficiaries, the prayers are therefore untenable for they are based on falsehood and non-disclosure of the correct position. He deponed further that he has surrendered the original title to the Land Registrar for purposes of fresh titles being issued in favour of the Applicants and all beneficiaries, the survey works has been conducted by the County Surveyor more than once and each person has a beacon/boundary mark to their respective shares, the last Court orders directed the Applicants to pay stamp duty as purchasers but they have failed to comply and instead lodged a Caution inhibiting issuance of title deeds in their favour.

### **Applicants' Supplementary Affidavit**

8. In a rejoinder, the 2<sup>nd</sup> Applicant swore the Supplementary Affidavit filed on 15/07/2022. She conceded that the 1<sup>st</sup> survey was conducted but the deceased went "missing" due to pressure from his sons - the Respondents, the only way is for the Court to visit the site and order a surveyor to conduct a survey to confirm the boundaries as per the mutation form dated 6/05/2004 which the deceased did not sign due to pressure from the Respondents, the Court confirmed the grant issued on 3/10/2013, the Applicants have been ready for 5 years to pay stamp duty, the Respondents sold some part of the land belonging to the Applicants to 3<sup>rd</sup> parties before issuance and confirmation of grant and such 3<sup>rd</sup> parties proceeded to develop and that is why the Respondents do not want the survey to be conducted.

### **Hearing of the Application**

9. The Application was canvassed by way of way of written Submissions. The Applicants filed theirs on 28/04/2023 while the Respondents filed on 17/05/2023.



## Applicants' Submissions

10. Counsel for the Applicants reiterated the matters deponed in the 2<sup>nd</sup> Applicant's Supporting Affidavit and added that this Court has jurisdiction to grant the prayers sought under rules 49, 72 & 73 of the *Probate and Administration Rules*, Article 159 of *the Constitution* and also section 1A (1) and (2) of the Civil Procedure Rules. He then quoted the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR and submitted that the Applicants had established a prima facie case. Counsel then added that the Respondents have been selling the estate land to third parties. In buttressing the illegality of such sale, Counsel cited the case of *In re Estate of Jamin Inyanda Kadambi (Deceased)* [2021] eKLR and also *Morris Mwiti Mburungu vs Denis Kimathi M'Mburungu* [2016].

## Respondents' Submissions

11. The Respondent's Counsel, too, reiterated the matters set out earlier and further submitted that the survey had already been carried out twice, the Applicants have their beacons affixed on their respective portions, the same was done in the presence of the Chief in the year 2003 and a mutation drawn and presented to the County Registrar for purposes of issuance of titles in favour of the beneficiaries, including the Applicants, the Applicants stopped the process by registering a caution over the property, the averments that the Respondents have sold part of the land belonging to the Applicants is denied. Counsel reiterated that, save for the 2<sup>nd</sup> Applicant, the Applicants have sold all their shares to third parties who are in occupation, that being the position, the 1<sup>st</sup> and 3<sup>rd</sup> Applicants have no locus standi to raise the issues contained in the Application.

## Analysis and Determination

12. Upon examination of the Pleadings, Affidavits, Submissions and the entire Record, I find the issue that arises for determination in this matter to be as follows:

“Whether the Applicants have demonstrated sufficient grounds to justify the need for this Court to issue orders directing the County Surveyor, Uasin Gishu County, to visit the site and demarcate the parcel of land in question in accordance with the confirmed Grant given herein.”

13. I now proceed to analyze and answer the said Issue.
14. It is not disputed that the Applicants were purchasers of portions of the estate property known as Uasin Gishu/Ngenyilel Settlement Scheme/424. This was duly captured, recognized and included in the Certificate of Confirmation. The Court has therefore already made a finding on the shares due to each interested person and each is therefore aware of his/her entitlement. Even as regards the boundaries, there does not seem to be any serious dispute over the location thereof. The only issue that appears to remain is implementation of the results of the survey and/or demarcation, to enable transfers to be effected and for the respective titles to be issued.
15. While the Respondents contend that the survey was already conducted and that the same only stalled because the Applicants lodged a caution against the title to parcel of land barring any dealings thereon, on their part, the Applicants claim that the implementation of the survey was not concluded because the Respondents frustrated the process with threats and intimidation.
16. I am aware of Court decisions which advance the reasoning that the Succession Court's mandate ends at distribution of the estate and that therefore issues such as those raised in the Application herein



are beyond a Succession Court's mandate as they entail transmission of the estate which, mandate a Succession Court does not have jurisdiction to handle.

17. I have in mind authorities such as the decision of Hon. Justice Musyoka made in *In re Estate of Reuben Mugesani Bulimu (Deceased)* Succession Cause No. 847 of 2013 [2020] eKLR, in which the Judge stated as follows:

“After a grant is confirmed, and a certificate of confirmation of grant issued, the process that follows is known as transmission, of the property from the name of the deceased to that of the beneficiaries named in the certificate of confirmation of grant. That would involve, where the property has to be shared amongst many persons, the subdivision of the property, before the resultant subtitles are registered in the names of the beneficiaries. Transmission is not provided for under the *Law of Succession Act*, nor under the Probate and Administration Rules. It has nothing to do with the probate court, and it is carried out at the lands registry. It is, therefore, a process under land legislation. The principal legislation is the *Land Registration Act*, No. 3 of 2012, and the *Land Act*, No. 6 of 2012. The *Land Registration Act* and the *Land Act* carry complementary provisions on transmission of property upon the death of an owner after the grant has been confirmed.

18. The Court in the said case declined to grant orders pertaining to survey of sub-divisions after confirmation of the Grant on the grounds that such orders touched on post-confirmation transmission and therefore were outside the jurisdiction of the Succession Court.

19. In another case, *In re Estate of the Late John Machongo Omori* [2020] eKLR, Hon. Justice A.K. Ndungu held as follows:

“land would fall within the jurisdiction of the Land Court rather than a Succession Court. This is more the reason why the petitioner contended in his submissions that the applicants have a recourse to file a suit in the Land Court. This Court would thus divest itself of the jurisdiction to deal with matters touching on demarcation of the estate property regard being given to the fact that the grant subject of this cause was duly confirmed and a certificate of confirmation grant dated 9<sup>th</sup> October 2009, issued to that effect.”

20. While such reasoning as above may be sound and based on acceptable logic, I find that due to the exceptional and/or unique circumstances arising in this matter, it will not serve the interest of justice to rule in a similar manner and thus send the parties to a different forum.

21. The exceptional circumstances arising herein include the fact that the deceased died in the year 2007, 16 years ago and this Cause was itself filed in the year 2013, 10 years ago. To date, the distribution of shares adopted in the Certificate of Confirmation of Grant is yet to be implemented because the parties are squabbling. Further, the parties are in agreement on almost all the important matters. In the meantime, the bad blood and tension between the parties continues to unnecessarily escalate. My view is that all that is being sought herein is basically implementation or execution of, or giving effect to, the orders already made by this Court. Under these circumstances, would it be fair to send the parties away and condemn them to a fresh round of protracted and expensive litigation in a different forum? Methinks not.

22. I therefore find that declining the invitation to determine the Application herein would be an abdication of this Court's noble duty of rendering justice and would only serve to add unnecessary agony to the already fatigued litigants.



## Final orders

23. In light of the foregoing, I allow the Summons dated 20/11/2021 in the terms hereunder and issue the following orders:
- i. In respect to the demarcation and survey of the property known as Uasin Gishu/Nyenyilel Settlement Scheme/424, to be implemented in accordance with the Grant of Letters of Administration confirmed in this Cause on 13/07/2017, the County Surveyor, Uasin Gishu County, shall, upon all requirements being met, including payment of the prescribed fees, conduct the following matters listed hereinbelow, within 45 days from the date hereof, and furnish the Applicants with all the necessary documentation required for the purposes of issuance of respective titles to the beneficiaries:
    - a. If a Survey was already conducted, then the said County Surveyor shall forthwith implement the results thereof.
    - b. If a Survey was conducted but not completed, then the said County Surveyor shall forthwith complete the same and implement the results thereof.
    - c. If no Survey was conducted at all, then the said County Surveyor shall forthwith conduct the same and implement the results thereof.
  - ii. Upon being furnished with the necessary documentation and upon all necessary requirements, including payment of the prescribed fees and removal of the Caution said to have been lodged by the Applicants, being met, the Land Registrar, Uasin Gishu County, shall forthwith excise or cause to be excised out of the parcel of land known as Uasin Gishu/Nyenyilel Settlement Scheme/424, the beneficiaries' respective portions in accordance with the Grant of Letters of Administration confirmed in this Cause on 13/07/2017 and issue respective title deeds to the beneficiaries.
  - iii. The Applicants shall bear the costs of the Survey, transfer, issuance of the title deeds and all related expenses, including payment of stamp duty.
  - iv. The Deputy Registrar of this Honourable Court is hereby directed and/or given liberty to sign and/or execute all and/or any document(s) necessary for the purposes of, or in connection to, the excision of the portions due to the beneficiaries out of the parcel of land known as Uasin Gishu/Nyenyilel Settlement Scheme/424, and/or for transfer of such portions and issuance of respective titles to the beneficiaries, in accordance with the Grant of Letters of Administration confirmed in this Cause on 13/07/2017 should the Respondents refuse or delay to do so.
  - v. I make no order on costs of the Application.
  - vi. This matter shall be mentioned after lapse of a period of sixty (60) days to confirm compliance.



DELIVERED, DATED AND SIGNED AT ELDORET THIS 13<sup>TH</sup> DAY OF OCTOBER 2023

.....

WANANDA J.R. ANURO

JUDGE

